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80-1766

IN THE

Supreme Court of the United States

October Term, 1980

No. _____

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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Dated: April 22, 1981

QUESTION PRESENTED

Does the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States, as applied to the states under the Fourteenth Amendment, require that an electric utility be compensated for the extraordinary costs of emergency electric power that it was compelled to purchase by an order of a state public utility commission during an electrical supply emergency?

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THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellant, Columbus and Southern Ohio Electric Company (hereinafter "C&SOE" or "the Company"), appeals from the December 23, 1980 judgment of the Ohio Supreme Court, which affirmed a decision by the Public Utilities Commission of Ohio (hereinafter "the Commission") denying C&SOE the right and authority to recover $6 million as just compensation for extraordinary purchased power expenses incurred by the Company, at the Commission's command, during an electrical supply emergency caused by the longest coal strike in history. C&SOE has consistently claimed that when the Commission ordered it to purchase power from other utilities because of the coal supply emergency, it was taking C&SOE's property (its capital funds) for public use. As such, C&SOE had an unequivocal right under the Fifth and Fourteenth Amendments to the United States Constitution to be fully and fairly compensated for such taking.

Although C&SOE's request for compensation began as a matter which should have been relatively routine, it has evolved into a landmark aberration in the field of constitutional law. Unless reversed, the Ohio Supreme Court's decision threatens to bankrupt any Ohio utility which is ordered by the Public Utilities Commission of Ohio to spend millions of dollars to alleviate an energy emergency. In this case, we are concerned with an uncompensated expenditure of $6 million; even larger expenditures could be required to avert future emergencies.

C&SOE respectfully submits this Jursidictional Statement to demonstrate that the Court has jurisdiction of the appeal and that a substantial constitutional question is presented which merits plenary review.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported as *Columbus & Southern Ohio Electric Company v. Pub. Util. Comm.*, 64 Ohio St. 2d 175, 413 N.E.2d 1208 (1980). The December 12, 1979 opinion and order of the Public Utilities Commission of Ohio denying C&SOE's request for compensation, and the Commission's February 14, 1978 order requiring C&SOE to purchase emergency power, are not reported. All of the opinions and orders below are reproduced in the Appendix, including the Supreme Court of Ohio's order overruling C&SOE's motion for rehearing.

JURISDICTION

This is an appeal from a judgment of the Supreme Court of Ohio which sustained an order of the Public Utilities Commission of Ohio against C&SOE's claim that the Commission's order denying compensation for the extraordinary costs of emergency electrical power violated the just compensation provision of the Due Process Clause

of the Fifth Amendment of the United States Constitution. The judgment of the Supreme Court of Ohio was entered on December 23, 1980. App. A8. C&SOE's motion for rehearing was overruled on January 22, 1981. App. A9.

A notice of appeal to this Court was filed in the Supreme Court of Ohio on April 16, 1981. App. A1. This appeal is being docketed in this Court within 90 days of the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In pertinent part, the Fifth Amendment to the Constitution of the United States reads as follows:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides, in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 4905.22, set out in full in the Appendix hereto, provides:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. * * *

STATEMENT OF THE CASE

Appellant, Columbus and Southern Ohio Electric Company, is a public utility which provides electric service to some 450,000 customers in an area which includes metropolitan Columbus, Ohio.[1] Since the company is in

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[1] C&SOE has been a subsidiary of American Electric Power Company, a public utility holding company, since May 1980. The American Electric Power system serves portions of Ohio, Indiana, Michigan, Kentucky, Tennessee, West Virginia, and Virginia.

The following is a listing of all parent companies, subsidiaries and affiliates of Columbus and Southern Ohio Electric Company, pursuant to the requirements of Sup. Ct. R. 28.1:

American Electric Power Company, Inc.
- American Electric Power Service Corporation
- Appalachian Power Company
  - Cedar Coal Company
  - Central Appalachian Coal Company
  - Central Coal Company
  - Central Operating Company
  - Kanawaha Valley Power Company
  - Southern Appalachian Coal Company
  - West Virginia Power Company
    - Colomet, Inc.
- Franklin Real Estate Company
  - Indiana Franklin Realty, Inc.
- Indiana & Michigan Electric Company
  - Blackhawk Coal Company
  - Price River Coal Company
- Kentucky Power Company
- Kingsport Power Company
- Michigan Electric Power Company
- Michigan Power Company
  - Michigan Gas Exploration Company
- Ohio Power Company
  - Beech Bottom Power Company, Inc.
  - Cardinal Operating Company
  - Central Coal Company
  - Central Operating Company
  - Central Ohio Coal Company

(footnote continued)

the business of supplying electricity to consumers within the State of Ohio, it is subject to regulation by the Public Utilities Commission of Ohio.[2]

The electricity supplied by C&SOE to its customers is generated primarily by large coal-fired boilers.[3] This coal is received at the Company's generating stations by truck and, at plants near company-owned mines, by conveyor belt. In 1977, the Company consumed 4,757,249 tons of coal at its plants.

On December 6, 1977, the longest coal strike in American history began.[4] Because a significant proportion of the Company's coal supplies came from UMWA mines, the strike caused an immediate cessation of coal shipments to the Company's plants. From the beginning of the strike, even non-union sources of coal supplies were shut off, as a result of picketing at Company plants, and violence and threats of violence to suppliers, truck and rail crews, and Company employees.

As coal supplies dwindled, increasing pressures were brought to bear on the Company and other utilities in the

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Southern Ohio Coal Company
Windsor Power House Coal Company
Ohio Valley Electric Corporation
Indiana-Kentucky Electric Corporation
Simco, Inc.
Twin Branch Railroad Company
Wheeling Electric Company

[2] Ohio Rev. Code Ann., §§ 4905.02, 4905.03, 4905.04 (Page 1977).

[3] In 1978, the Company had a generating capacity of 2,735,000 kilowatts. Over 90% of this capacity is coal-fired.

[4] The strike directly affected mines in the Eastern region of the United States which are manned by members of the United Mine Workers of America (UMWA). The strike lasted 110 days, from December 6, 1977 to March 25, 1978.

region, which were desperately trying to maintain continued electrical service to customers during an extremely severe winter. On February 8, 1978, Ohio's Governor declared a statewide energy emergency because of the serious shortage of electrical energy. App. A95. On February 14, 1978, the Public Utilities Commission of Ohio ordered C&SOE and other utilities to "purchase all available power so that the useable number of days of coal supply within Ohio will be extended."[5] App. A92. This order was made with full knowledge that purchased power would be more costly to C&SOE than power which the Company could generate itself.

In compliance with the Commission's order, C&SOE purchased $19 million worth of power from utilities in states as far distant as New Jersey and Illinois. These purchases extended dwindling coal supplies, prevented severe curtailments of power, and benefited all consumers within the Company's service area. In short, the Company's capital funds were used to purchase emergency power for the good of the general population in its service area.

Through a special Ohio statute, the Company was able to recover $13 million of this $19 million expenditure as fuel charges.[6] However, despite the extraordinary, non-

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[5] The purchase of power was not the only available method of preserving coal supplies. Further curtailments of power and mandatory conservation were alternative responses which were available to the Company under emergency electrical procedure tariffs previously approved by the Commission. However, the Commission precluded the Company from instituting these procedures, apparently because they would have imposed further burdens on the consuming public.

[6] The Company's tariffs, approved by the Commission, contain a "fuel adjustment clause" which permits periodic adjustments to the Company's rates to reflect the changing costs of fuel. *See* Ohio Rev. Code Ann. §§ 4905.301, 4909.181, 4909.191 (Page 1977).

recurring nature of this emergency action, which was ordered by the Commission itself, the Company's request for authority to recover the $6 million non-fuel charges was flatly denied by the Commission, stating:

> To put it simply, we do not believe that we must reimburse utility companies for past losses or provide 100 percent recovery of past expenses even if they were incurred at the direction of the Commission. App. A55.

In other words, the Ohio Commission believed it could order a utility to take extraordinary action and to sustain losses without any concomitant duty to provide compensation.

On affirming the Commission's order, the Ohio Supreme Court announced that "appellee simply ordered appellant to do only that which appellant had a statutory obligation to provide for the public." 64 Ohio St. 2d at 177, 413 N.E.2d at 1210. App. A5. The court declared that since "appellant *must* furnish adequate service to its customers" under Ohio Rev. Code § 4905.22, there was "no taking of private property and, thus, no due process violations." *Id.* Finally, the court found that the Company "has no constitutional right to recover past and unrecovered costs through present and future rates." 64 Ohio St. 2d at 177-78, 413 N.E.2d at 1210. App. A6.

The Company raised its federal constitutional claim before the Commission, and in its notice of appeal to the Ohio Supreme Court. App. A97. The Ohio Supreme Court specifically rejected the Company's claim that the Commission's order was repugnant to the Constitution. The issue was again raised in C&SOE's motion for rehearing, which was overruled by the Ohio Supreme Court on January 22, 1981.

THE QUESTION IS SUBSTANTIAL

We believe this Court can take judicial notice that public utility energy shortages will be an American way of life for the foreseeable future. Thus, not only has C&SOE been unconstitutionally deprived of its property as a result of a past energy supply emergency, but it and other utilities face the prospect of repeated such assaults in the future. According to the Ohio Supreme Court, C&SOE must provide unusually expensive emergency power to its customers whenever ordered, and cannot recover compensation for the expense. This judgment simply cannot survive even rudimentary constitutional inspection.

There was no dispute in this case that the Commission's orders affected a valuable property right of the Company, since the Company was forced to expend over $6 million of its capital for emergency energy supplied to its customers. Rather, the opinion of the Supreme Court of Ohio suggests that the Commission's orders did not effect a "taking" of that property, because "appellee simply ordered appellant to do only that which appellant had a statutory obligation to provide to the public." 64 Ohio St. 2d at 177, 413 N.E.2d at 1210, App. A5. But as Justice Holmes observed in his dissent, the fact that C&SOE has an obligation to provide service, and is subject to regulation by the Commission, does not mean that such service can be compelled without compensation. 64 Ohio St. 2d at 178, 413 N.E.2d at 1210. App. A7.

Even where a government agency takes property as a result of the legitimate exercise of the police power, it is nonetheless compelled to compensate for the taking. *Berman v. Parker*, 348 U.S. 26, 36 (1954); *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1237, 1332 (9th Cir. 1977). Although government, in the exercise of the police power, may legitimately impose service obligations upon public utilities, it cannot do so without

authorizing just compensation for the compelled use of the utility's property. *Interstate Commerce Commission v. Oregon-Washington R. & N. Co.*, 288 U.S. 14, 39 (1933); *Interstate Commerce Commission v. Chicago Great W. Ry. Co.*, 209 U.S. 108 (1908). *See also, State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 416 S.W.2d 109 (Mo. Sup. Ct. 1967); *Beloit v. Public Service Commission*, 34 Wis. 2d 145, 148 N.W.2d 661 (1967).

As its justification for disregarding this principle, the Ohio Supreme Court observed that "a public utility has no constitutional right to recover past and unrecovered costs through present and future rates," citing *Bluefield W.W. & Improvement Co. v. Public Service Comm.*, 262 U.S. 679 (1923). 64 Ohio St. 2d at 178, 413 N.E.2d at 1210, App. A6. The Ohio Supreme Court's citation of *Bluefield* demonstrates its misunderstanding of the issue in this case. Unlike *Bluefield*, the instant case does *not* involve a traditional ratemaking proceeding where just and reasonable rates are set based upon the level of investment and *ordinary* operating expenses during a representative period. Rather, this case involves the utility's right to compensation for a specific *extraordinary* expense incurred at the Commission's command, an expense for which the Company was not compensated under its ordinary rates. *See Narragansett Electric Co. v. Burke*, ... R. I. ....., 415 A.2d 177 (1980).

This critical distinction was grasped by a Pennsylvania court in affirming a decision by the Pennsylvania Public Utilities Commission allowing Duquesne Light Company compensation for the costs of emergency power purchased during the very same coal strike:

> An important distinction must be drawn between the traditional utility rate proceeding and Duquesne's petition in this case. In the former, it is the commission's duty to insure that "[a] public utility in this commonwealth . . . receive a fair return on the fair value of its

> property used and useful in the public service at the time rates are established or at the time value is in issue." [citation omitted]
>
> • • • • •
>
> To fill the obvious value and need for some measure of predictability and semi-permanence in this [*i.e.*, traditional rate-making] area, "[t]he object of test-year figures is to reflect *typical conditions*" . . . [citation omitted]. Thus, it is apparent that Duquesne neither desired nor would have been permitted to recover the unusual costs of purchased power by means of the traditional rate-making process. For Duquesne, the primary effect of the coal strike was the extraordinary need to purchase power from other utilities, and it was from this single, specific, and unusual circumstance that Duquesne sought relief."
>
> *City of Pittsburgh v. Pennsylvania Pub. Util. Comm.*, 42 Pa. Commw. Ct. 242, 400 A.2d 672, 674 (1979).

Unlike the Pennsylvania court, the Supreme Court of Ohio reached the incredible conclusion that because C&SOE was compelled by Ohio statute to furnish "necessary and adequate service,"[7] it had no right to compensation for that service. This conclusion is not compelled or even suggested by *Bluefield*, violates the Fifth and Fourteenth Amendments, and is contrary to numerous decisions of this Court. As stated in the dissent by Justice Holmes, "the service which the commission ordered was beyond that which would have normally satisfied the utility's duty under the law," and C&SOE "should be reasonably compensated for such service." 64 Ohio St.

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[7] Nearly all states, including Pennsylvania, have similar provisions requiring regulated public utilities to provide "necessary and adequate service." *See, e.g.*, 64 Am. Jur. 2d, Public Utilities, § 16 (1972); 66 Pa. Cons. Stat. § 102 (1978). These statutes have never before been held to require a public utility to render such service without just compensation therefor.

2d at 178, N.E. 2d at 1210, App. A7. While the dedication of public utility property to the service of the public necessarily implies the right of government to subject that property to regulation, "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

C&SOE does not here doubt that faced with the electrical supply emergency, the State of Ohio could properly exercise the police power to compel purchases of power to insure an undiminished supply of power to the public, thereby avoiding the inconvenience and hardship to the public of further curtailments of service. But, as Mr. Justice Holmes observed in *Pennsylvania Coal*, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416.

As a result of the order of the Commission and the judgment of the Ohio Supreme Court, the public obtained the benefit of an undiminished supply of electrical energy at a time of extreme emergency, all at the expense of the Company and its shareholders. This is exactly the type of taking of private property for public benefit which requires just compensation:

> The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.
>
> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In denying such compensation to the Company, the Ohio Supreme Court has adopted a rule which, unless reversed by this Court, holds extremely grave consequences for C&SOE and other Ohio utilities. It is a rule

which admits of no exceptions due to different facts or parties, and which is unequivocably destructive of constitutionally guaranteed rights. It must be reversed by this Court.

CONCLUSION

Because of the statutory law of Ohio, C&SOE's ability to survive as a viable corporate entity is, in large part, controlled by the Public Utilities Commission of Ohio. Hence, the constitutional guarantees accorded the Company are its first line of defense against governmental abuse. Under Ohio law, the only court which could review the order issued by the Commission is the Ohio Supreme Court. Thus, the Company must depend upon the Ohio Supreme Court to correctly identify and steadfastly preserve its constitutional rights as a citizen of Ohio and of the United States. In the case at bar, the Ohio Supreme Court has abdicated that responsibility, and has reached a result which is impermissible under the United States Constitution. Appellant's only hope for relief now rests in the instant appeal. Therefore, Columbus and Southern Ohio Electric Company respectfully requests that the Court note probable jurisdiction in this case.

Respectfully submitted,

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Dated: April 22, 1981

IN THE

Supreme Court of the United States

October Term, 1980

No. _____

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

APPENDIX TO JURISDICTIONAL STATEMENT

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Dated: April 22, 1981

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IN THE SUPREME COURT OF OHIO

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, *Appellant,*	)	
vs.	)	No. 80-503
THE PUBLIC UTILITIES COMMISSION OF OHIO *Appellee.*	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Columbus and Southern Ohio Electric Company, the appellant herein, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of Ohio, affirming the opinion and order of the appellee Public Utilities Commission of Ohio, entered in this action on December 23, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 1981, copies of this notice of appeal were served upon each of the following parties and counsel of record by first class mail, postage prepaid:

The Public Utilities Commission of Ohio
375 South High Street
Columbus, Ohio 43215

Harris S. Leven, Esq.
Assistant Attorney General
Public Utilities Section
375 South High Street
Columbus, Ohio 43215

I further certify that all parties required to be served have been served.

/s/ WILLIAM J. KELLY, JR.
Attorney for Appellant

COLUMBUS & SOUTHERN OHIO ELECTRIC COMPANY, APPELLANT, *v.* PUBLIC UTILITIES COMMISSION OF OHIO, APPELLEE.

[Cite as C & SOE v. Pub. Util. Comm. (1980), 64 Ohio St. 2d 175.]

Public Utilities Commission—Electric companies—Request for recovery of non-fuel costs associated with emergency period—Properly denied, when.

(No. 80-503 – Decided December 23, 1980.)

APPEAL from the Public Utilities Commission.

Columbus & Southern Ohio Electric Company (appellant herein) is appealing from the Public Utilities Commission's (appellee herein) denial of appellant's request for a temporary surcharge of over $6,000,000 * as a means of recovering non-fuel costs of power purchased during the emergency period in the first quarter of 1978 resulting from the United Mine Worker's strike.

During that emergency period, appellee ordered Ohio electric utilities to buy electric power through the interconnected transmission system to arrest the decline of coal supplies and thereby preserve service to customers without the need for mandatory curtailments. The purpose of the order to purchase all available power through the interconnected system was to preserve the integrity of the system in that the failure of one utility company to maintain

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* In its application of May 2, 1978, for a temporary emergency purchased power cost surcharge (case No. 78-848-EL-UNC), appellant originally sought to recover $3,164,128.29. Subsequently, in a memorandum filed with the court in conjunction with its appeal from the commission's dismissal of the application on June 29, 1978 (case No. 78-1354), appellant indicated that the amount to be recovered was "estimated at $6.0 million." The level of the recovery presently being sought by appellant, $6,056,524, is not at issue in the proceeding.

adequate levels of power could culminate in a regional blackout adversely affecting all utility companies.

Appellant purchased the emergency energy at a cost of approximately $19,000,000, consisting of $13,000,000 in fuel expenses and the disputed $6,000,000 in non-fuel expenses. In 1978, appellant recovered the $13,000,000 fuel expenses through its fuel adjustment clause.

In its March 1, 1979, request for permanent rate relief (case No. 78-1438-EL-AIR), appellant also sought permission to recover the $6,000,000 non-fuel expenses through a temporary tariff. It sought authority to pass on such non-fuel expenses to its customers over a four-month period, based on the customer's kilowatt hour usage as shown on its January, February and March, 1978, bills.

Appellee refused to authorize compensation to appellant, stating in its opinion and order of December 12, 1979, as follows:

"To put it simply, we do not believe that we must reimburse utility companies for past losses or provide a 100 percent recovery of past expenses even if they were incurred at the direction of the Commission."

Thereafter, appellant filed an application for rehearing which was denied.

The cause is now before this court on an appeal as a matter of right.

Messrs. Porter, Wright, Morris & Arthur, Mr. Samuel H. Porter, Mr. Curtis A. Loveland and *Mr. William J. Kelly, Jr.*, for appellant.

Mr. William J. Brown, attorney general, *Mr. Marvin I. Resnik* and *Mr. Harris S. Leven*, for appellee.

Per Curiam. Appellant asserts that appellee's refusal to authorize its recovery of the full cost of the emergency

energy period violates due process by the taking of private property without just compensation.

We find no merit in appellant's contention.

Appellant asserts that the Fifth and Fourteenth Amendments to the United States Constitution and Sections 1, 16 and 19 of Article I of the Ohio Constitution have been violated by the refusal to allow recovery of the non-fuel costs.

Initially, it is noted that the appellee, by and through its statutory powers, has consistently disallowed utility companies, including appellant, from recovering the non-fuel costs associated with the emergency period in the instant cause. (See *Re Ohio Edison Company*, case No. 77-1249-EL-AIR et al. [November 17, 1978], opinion and order at pages 21-22; *Re Monongahela Power Company*, case No. 78-625-EL-FAC [November 22, 1978], opinion and order at pages 16-17, and cases cited therein.)

It is undisputed that appellee did order appellant, as well as other utility companies, to purchase energy power in order to prevent curtailment or interruption of service during the emergency period.

Dispositive of appellant's claim of an unjust taking of private property is the fact that appellee simply ordered appellant to do only that which appellant had a statutory obligation to provide for the public.

R. C. 4905.22, which reads in the imperative, states that appellant *must* furnish adequate service to its customers, and provides as follows:

"Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or de-

manded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission."

Therefore, appellee imposed no new or additional obligations upon appellant but rather reaffirmed existing statutory obligations. Therefore, there was no taking of private property and, thus, no due process violations.

Furthermore, it is noted that the purpose of appellee's order directing the "purchase [of] all available power" was simply to preserve the integrity of the interconnected network of facilities among electric utility companies. The failure of one utility to maintain an adequate level of reserve power could initiate a regional blackout, which would adversely affect even those utilities with sufficient coal supplies. Therefore, appellee's order, in effect, gave appellant an unquantified benefit by assuring that no other utility's failure to provide energy would adversely reflect upon the appellant's ability to provide future services.

Finally, it is noted that a public utility has no constitutional right to recover past and unrecovered costs through present and future rates. *Bluefield W. W. & Improvement Co.* v. *Public Service Comm.* (1923), 262 U.S. 679.

For the foregoing reasons, the order of the Public Utilities Commission is affirmed.

Order affirmed.

CELEBREZZE, C. J., W. BROWN, P. BROWN, SWEENEY, LOCHER and DOWD, JJ., concur.

HOLMES, J., dissenting. I must dissent in that I feel that not to reimburse, or at least make certain allowances

to this utility company, for all the commission mandated costs associated with the provision of electrical services during the coal strike emergency is not only inequitable, but borders upon being an unconstitutional taking of property and a violation of due process of law.

It is true that R. C. 4905.22 mandates that public utilities furnish necessary and adequate service and facilities, but the utility should in return be compensated in a just and reasonable manner. Here, in my view, the service which the commission ordered was beyond that which would have normally satisfied the utility's duty under the law. It should be reasonably compensated for such service.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1980 TERM
City of Columbus.) To wit: December 23, 1980

COLUMBUS & SOUTHERN OHIO ELECTRIC COMPANY,	)	No. 80-503
Appellant,	)	APPEAL FROM
vs.	)	THE PUBLIC
PUBLIC UTILITIES COMMISSION OF OHIO,	)	UTILITIES COMMISSION
Appellee.	)	OF OHIO

This cause, here on appeal from the Public Utilities Commission of Ohio, was heard in the manner prescribed by law. On consideration thereof, the order of the Public Utilities Commission is affirmed for the reasons stated in the opinion herein.

It is ordered that a mandate issue to the Public Utilities Commission of Ohio to carry this judgment into execution.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

..... *Clerk*

..... *Deputy*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1981 TERM
City of Columbus.) To wit: January 22, 1981

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, *Appellant,*	)	No. 80-503 REHEARING
vs.	)	
PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee.*	)	

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. .... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 22nd day of January, 1981.

THOMAS L. STARTZMAN, *Clerk.*

By ....., *Deputy.*

Before

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application and Complaint and Appeal of Columbus and Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service.	))))))	**Case No. 78-1438-EL-AIR**

OPINION AND ORDER

The Commission, coming now to consider the above-entitled application, filed pursuant to Section 4909.18 of the Revised Code, and complaint and appeal, filed pursuant to Section 4909.34 of the Revised Code, the exhibits filed therewith, the Staff Report of Investigation issued pursuant to Section 4909.19 of the Revised Code, and the testimony and exhibits introduced at public hearing; having appointed Attorney Examiners Helen L. Liebman and Randall E. Yontz, pursuant to Section 4901.18 of the Revised Code, to conduct the public hearing and to certify the record directly to the Commission; and being fully advised of the facts and issues in this case, hereby issues its Opinion and Order.

APPEARANCES:

Messrs. Porter, Wright, Morris and Arthur, 37 West Broad Street, Columbus, Ohio by Messrs. Samuel H. Porter, Curtis A. Loveland and William J. Kelly, Jr., on behalf of the applicant, Columbus and Southern Ohio Electric Company.

Mr. William J. Brown, Attorney General of Ohio, by Messrs. Harris S. Leven and Jonathan L. Heller, Assistant

Attorneys General, 180 East Broad Street, Columbus, Ohio, on behalf of the Staff of the Public Utilities Commission.

Mr. Gregory S. Lashutka, City Attorney, Mr. John W. Bentine, Assistant City Attorney, and Mr. John C. Klein, Legal Intern, 90 West Broad Street, Columbus, Ohio, on behalf of the City of Columbus, Department of Energy and Telecommunications, and consumers of Columbus and Southern Ohio Electric Company within the City of Columbus.

Mr. William A. Spratley, Consumers' Counsel, by Messrs. John Parks Hopkins and Orla E. Collier and Ms. Gretchen J. Hummel, Associate Consumers' Counsel, 137 East State Street, Columbus, Ohio on behalf of residential consumers of Columbus and Southern Ohio Electric Company.

Messrs. Bell and Clevenger, 21 East State Street, Columbus, Ohio, by Mr. Langdon D. Bell and Mr. Samuel C. Randazzo, on behalf of intervenors Anheuser-Busch, E I Du Pont De Nemours, General Motors Corporation, and the Ohio Council of Retail Merchants.

Messrs. Schwarzwalder, Sanford, Fisher and Fahey, 141 East Town Street, Columbus, Ohio, by Messrs. William E. Boyland and Richard P. Fahey, on behalf of the Ohio Association of Community Action Agencies.

The Legal Aid Society of Columbus, by Mr. Archie Jennings, Jr., 241 South High Street, Columbus, Ohio, on behalf of Margaret Willis.

HISTORY OF THE PROCEEDING:

The Columbus and Southern Ohio Electric Company (C&SOE), the applicant in this case, is an Ohio corporation engaged in the business of generating and supplying

electric service to some 445,000 residential, commercial and industrial customers in all or parts of 25 counties in central and southern Ohio. C&SOE is a public utility and an electric light company within the definitions of Sections 4905.02 and 4905.03(A) (4) of the Revised Code and, as such, is subject to the jurisdiction of this Commission, pursuant to Sections 4905.04, 4905.05 and 4905.06 of the Revised Code.

On November 17, 1978, C&SOE filed with the Commission a notice of intent to file an application for an increase in rates, throughout its service territory, pursuant to Section 4909.18 of the Revised Code. On January 29, 1979, the Council of the City of Columbus enacted Ordinance No. 105-79, which would have continued in effect the present rates for electric service within the City of Columbus for a period of three years. By notice of February 22, 1979, C&SOE advised the City of Columbus and the Commission that it would not accept the ordinance, and that it would continue to charge its currently authorized rates in accordance with the provisions of Section 4909.34 of the Revised Code, pending Commission action on its permanent application and on its complaint and appeal.

The application and complaint and appeal were filed on March 1, 1979. The supporting materials were based on a test period of the twelve months beginning September 1, 1978 and ending August 31, 1979, with a February 28, 1979 date certain, as had been approved by the Commission in its December 6, 1978 Entry.

By Entry of March 28, 1979, the Commission found that the application met the requirements of Section 4909.18 of the Revised Code and the Commission's Standard Filing Requirements, and accepted the applica-

tion for filing as of March 1, 1979, and also indicated that the portion of the company's service territory located within the Columbus corporation limits should be treated as a complaint and appeal. Finding No. 7 of the Entry went on to state that any increase in rates approved by the Commission in this case would not go into effect in the City of Columbus until March 31, 1980, the date on which Ordinance No. 105-79 would have gone into effect had it not been appealed. On April 18, 1979, C&SOE filed an Application for Rehearing from the Entry, on the ground that Finding No. 7 was unreasonable and unlawful. By Entry of May 18, 1979, the Commission granted C&SOE's application, permitting the filing of briefs by the parties and of *amicus* briefs by June 15, 1979, and scheduling oral argument for June 22, 1979.

By Order on Rehearing, issued August 29, 1979, the Commission determined that the two year provision in Section 4909.39 should not be applied to the situation in which a utility company files for a rate increase and ruled that the limitation would not be placed on the effectiveness of new rates within the City of Columbus.

In accordance with the provisions of Section 4909.19 of the Revised Code, the Staff of the Commission conducted an investigation of the matters set forth in the application and complaint and appeal, and in the exhibits filed in this case. A written report of the results of the investigation was filed on August 6, 1979. Service of the Staff Report was made pursuant to Section 4909.19 of the Revised Code. Objections to the Staff Report were timely filed by C&SOE and by the intervenors in this case.

By Entry of August 8, 1979, the Commission set this matter for public hearing beginning September 10, 1979. On that date, an opportunity was given for public testi-

mony and a pre-hearing conference was held. The taking of expert testimony began on September 12, 1979, and continued until October 18, 1979. Briefs were filed November 5, 1979, and oral argument was heard by the Commission on November 9, 1979. Reply briefs were filed by the company, the Staff and OCC on November 13, 1979.

COMMISSION REVIEW AND DISCUSSION

This case comes before the Commission upon the application of the Columbus and Southern Ohio Electric Company pursuant to Section 4909.18 of the Revised Code for authority to increase its rates for electric service to its jurisdictional customers and upon the complaint and appeal of the company from Ordinance No. 105-79 of the City of Columbus, Ohio, pursuant to Section 4909.34 of the Revised Code. C&SOE seeks approval of an increase in annual revenues of $126 million based on its analysis of test year operations. The Commission must evaluate the evidence presented at the public hearing and determine whether C&SOE's existing rates are inadequate and if the ordinance appealed from is unreasonable. If the company sustains its burden of proof on these points, the Commission must then establish rates which will afford the company the opportunity to earn a fair rate of return.

RATE BASE

The company, the Staff and Consumers' Counsel each offered testimony and submitted exhibits in support of their respective rate base proposals in this proceeding. The following table compares the company and Staff estimates of the value of the applicant's property used and useful in rendering service affected by this proceeding as of the date certain, February 28, 1979. The adjustments to these pro-

posals recommended by the intervenors will be discussed below.

Jurisdictional Rate Base
(000's omitted)

	Applicant[1]	Staff[2]
Plant in Service	$1,156,145	$1,140,725
Less: Depreciation Reserve	253,481	244,292
Net Plant in Service	902,664	896,433
Plus: CWIP	178,364	6,941
Working Capital	46,107	35,476
Plant Held for Future Use	2,010	—o—
Less: Customer Advances for Construction	—o—	58
Deferred Taxes	15,237	24,383
Jurisdictional Rate Base	$1,113,908	$ 914,409

Excess Land

A $888,465 adjustment to plant in service was made by the Staff to account for its determination that a portion of the land accounts was not used and useful (Staff Ex. 1, pp. 16-17 and Sch. 8.2a). A physical inspection was made of 36 parcels of land, and a determination was made that a certain portion of the parcels was not used and useful, giving recognition to the normal acreage requirement necessary to adequately support the installation (XIII, 94, 95).

The company argues that the Staff's approach, which admittedly does not consider the company's ability to buy only that amount needed for a specific facility (XIII, 96-97), penalizes the company even though the purchase may

[1] App. Ex. 19, Sch. B-1.

[2] Staff Ex. 1, Sch. 7, as revised by testimony of Jerry L. Wissman (Staff Ex. 7) and Said A. Hanna XIII, 116).

have been reasonable and necessary (App. Ex. 31, p. 15). We do not disagree, and we do not intend to imply by a rate base adjustment for "excess land" that we have found the company's land purchase to have been imprudent. However, the statute is clear that there cannot be included in rate base the value of land that was not in use at the date certain. Section 4909.05(C) of the Revised Code. We believe that the Staff's adjustment is consistent with the dictates of the statute.

We also approve the method by which the dollar value of the excluded portions was determined, which was to multiply the original cost of the total parcel by the percentage determined to be not used and useful (XIII, 97). We have, in past cases, accepted that method of apportioning the purchase price of the parcel. *See Ohio Edison Company,* Case No. 77-1249-EL-AIR *et al.* (Opinion and order, April 16, 1979). Section 4909.05(C) of the Revised Code requires the determination of the original cost of land; the market value of the portions included or excluded is simply not a consideration in our determination. We will accept the Staff's adjustment as reasonable. There was specific mention during the hearing of the exclusion of a portion of the land at the Minerva Lake Northeast Service Headquarters. In its brief, the Staff concedes that the entire parcel was in use at the date certain. The adjustment should be changed accordingly.

Excess Production Capacity

As it has done in all recent major electric rate cases, the Staff has examined C&SOE's generating capacity to determine whether it exceeds that which is reasonably required to meet the company's net peak demand, and to afford an adequate reserve margin, taking into account four factors: seasonal deratings, partial unit deratings, operating availability, and spinning and quick start re-

serves. As a result of its analysis, the Staff has concluded that the company had excess capacity of 123 megawatts, and has recommended a corresponding rate base reduction of $10,753,715 (Staff Ex. 1, pp. 17-19, and Sch. 8.2c). In its brief, the Staff argues that to ignore excess capacity is to encourage unit deratings, so that all units will have been used and hence includable in the rate base, rather than the improvement of unit productivity which will prevent the need for costly new generating units.

Using the four factor method, the Staff determined that an adequate average reserve margin for C&SOE is 36.8 percent. The 123 KWH capacity above that level was considered excessive. Mr. Bassett explained that at a point when the company is about to add a major new unit to its system, its capacity should be at the low end of the reserve margin, and that the numbers indicate that the minimum acceptable reserve for C&SOE is too high (XI, 141-142, XII, 113).

It is clear that the Staff is attempting to improve its analysis of production capacity and that the use of the four factor method meets some of the objections which have been made to this adjustment in past cases. However, the method still has flaws which make a rate base deduction unreasonable. Although the Staff attempts to analogize the proposed excess production capacity adjustment to excess land adjustments, which have been accepted by the Commission, there are theoretical differences between the two types of adjustment. We have found, as the basis for accepting the excess land adjustments, that certain portions of a land parcel are not in use when the parcel is larger than that which is reasonably required. However, it cannot be said that certain generating units were not in use during the test year; the units picked by the Staff to represent the excess capacity were used and useful during the test period (App. Ex. 31, p. 10).

Although Mr. Bassett's view that C&SOE's capacity should be at the low end of the reserve margin when a major new unit will shortly be coming on line is an interesting approach to the determination of excess capacity, the use of the September 20, 1978 peak demand renders his conclusion as to the level of the reserve margin suspect. Mr. Fenstermaker pointed out that had it not been for an unpredictable rainstorm on August 24, 1979, demand would have reached 2027 MW (III, 124). Had that level of demand been used in the Staff's analysis, C&SOE would have had almost no excess capacity (XI, 149).

We have indicated that the relevant question in determining whether a rate base adjustment for excess capacity is appropriate, is not whether a company's reserve margin exceeds a particular level at a given point in time; rather, the question which must be asked is whether it is unreasonable in light of all relevant factors. We cannot conclude that C&SOE's reserve margin is unreasonable, and we will not make an excess production capacity adjustment to the rate base.

Excess Transmission Capacity

The Staff also analyzed C&SOE's transmission facilities to determine whether there is excess capacity in its transmission system. An analysis of transmission capacity has been done in other recent electric rate cases, and the Staff has modified its analysis in each case. In both *Dayton Power and Light Company*, Case No. 78-92-EL-AIR (Opinion and Order, March 9, 1979) and *Cleveland Electric Illuminating Company*, Case No. 78-677-EL-AIR (Opinion and Order, May 2, 1979), the Staff's analysis was based on an application of Kelvin's Law, and dealt with optimum conductor sizing; in the latter case ampacity considerations were added. In this case, the Staff also considered load growth of 50 per cent, and, to account for contingencies, the adjustment arrived at by using these

other factors was reduced by 50 per cent (Staff Ex. 1, pp. 22-23; XI, 155-156). The Staff concluded that C&SOE has 29.64 per cent excess capacity on its 138KV lines and 4.66 per cent excess capacity on its 345KV lines, and recommends a rate base deduction of $4,763,818 (Staff Ex. 1, Sch. 8.2d).

The company objected to the proposed rate base adjustment; Mr. Fenstermaker termed the Staff's method and the underlying assumptions "entirely inappropriate" to analyze C&SOE's transmission system (App. Ex. 31, p. 12).

Mr. Fenstermaker points out that any change in the transmission network would cause changes in current flows and losses on other lines; he stresses that "an entire series of loadflow studies would be required in order to perform a valid analysis" (App. Ex. 31, p. 13). Mr. Bassett conceded that a complex loadflow program would be needed to assess the impact of such changes (XI, 166). Mr. Bassett also conceded that C&SOE's interconnection with other utilities and its commitments as part of the East Central Area Reliability (ECAR) group were relevant to the design of the transmission network, factors which he did not consider (XI, 174).

We have, in the *DP&L* and *CEI* cases, indicated that the application of Kelvin's Law does not account for all of the relevant factors in an analysis of a company's transmission network. Although the Staff attempted to correct for all of the factors which were not explicitly examined by making a 50 percent reduction in its otherwise calculated adjustment, this does not provide a proper basis for a rate base deduction. We must, therefore, sustain the company's objection to this adjustment.

Construction Work in Progress

Much of the testimony in this case went to the issue of the proper allowance to be made for construction work in

progress. The company has requested an allowance of $177,966,000 for CWIP, of which $171,025,000 represents the company's investment in the three projects which make up Zimmer Unit No. 1, a nuclear generating facility being constructed by the CCD companies (C&SOE, the Cincinnati Gas and Electric Company and the Dayton Power and Light Company).

It is interesting to note that in C&SOE's last rate case, decided in March of 1978, the company requested $110,982,000 as an allowance for the Zimmer project, and the Commission did not even have to address the question of whether it was 75 percent complete (*See* Case No. 77-545-EL-AIR). However, in this case, the issue of whether the project meets the statutory 75 percent complete test has been the subject of much testimony and argument.

At the time the Staff Report for this case was being prepared, the anticipated commercial in-service date for Zimmer was January of 1980. Only days before the issuance of that report, and just a month before the start of the hearing, CG&E, the project manager, announced a revised in-service date of January, 1981 (App. Ex. 13A, p. 1; III, 23). According to company witness James P. Fenstermaker, the delay was caused by additional licensing requirements of the Nuclear Regulatory Commission and changes in the design criteria for the plant's containment vessel (III, 17-18). These changes did not alter the conclusion of the company or Staff witnesses that the project was 75 percent complete at the date certain. Consumers' Counsel argues, however, that the delay and the need for additional work cast doubt on that determination.

Consumers' Counsel starts its assault on the 75 percent determination, however, by arguing that the three parts of the Zimmer plant, which were identified as the Zimmer Unit No. 1, the substation and the fuel core, are separate construction projects which should be examined separately

for purposes of determining percent completion (OCC Brief, p. 17). We cannot agree with Consumers' Counsel's reading of Section 4909.15(A) (1) of the Revised Code to require the separation of these three parts; it is clear that the integrity of Zimmer plant is dependent upon consideration of all three parts. We cannot let our determination of what constitutes a project be governed by the company's assignment of project numbers. We are, likewise, not persuaded by the argument that the fuel core should not be considered at all in our determination because it does not qualify as construction (OCC Brief, p. 18). Although a portion of it may be consumable, the fuel core is not "just the same as coal or oil," as Consumers' Counsel suggests. We do not believe it to be unreasonable to include the fuel core in the consideration of the Zimmer project.

The record in this case is replete with testimony regarding the proper test to determine percent completion, and the correct numbers to use in that test. The company maintains that the manhours expended test is the best; the most conservative of Mr. Fenstermaker's numbers, using manhours expended at the date certain and the latest estimated total manhours, is 87 percent (App. Ex. 31, p. 3). Both the Staff and Consumers' Counsel contend that this test should not be used, relying on testimony that manhours increase exponentially at the end of a project and that a determination of completeness at any given point by use of that method may not be accurate (XI, 117).

Both the Staff and Consumers' Counsel rely on a dollars expended test, but each of the three witnesses provides a different calculation. Mr. Christopher Bassett and Mr. Said A. Hanna, testifying for the Staff, using different figures for date certain dollars expended and different total project estimate figures, both arrive at the conclusion that Zimmer was slightly more than 76 percent complete. Mr. Bassett's numbers were from total project estimates at Sep-

tember 12, 1979 excluding AFDC, and audited date certain expenditures. Mr. Hanna used a revised total project estimate supplied on September 25, including AFDC only until December 1, 1979, assuming Zimmer is to be included in the rate base, and date certain figures which incorporated three unaudited adjustments (*See* Staff Ex. 4-A). Mr. Kenneth A. Hagstrom testifying for Consumers' Counsel concluded that the project was about 70 percent complete, taking date certain dollars expended from the company's six and six filing, and the total project estimate from that filing, updated with information from the press regarding the new total (OCC Ex. 6, p. 8). On brief, Consumers' Counsel computes the percent using the total project estimate including AFDC as provided by the company in its Exhibit 24, and arrives at a slightly lower figure (OCC Brief, p. 9).

The company has also provided a percent complete calculation based on dollars expended, using different numbers than were used by the other three witnesses testifying on this subject. The company argues that if this test is to be used, the dollars spent early in the construction should be trended, so that all dollars are equivalent. Using the Handy-Whitman Index, the expenditures exclusive of AFDC were trended to 1979 levels, and the conclusion reached was that Zimmer was about 79 percent complete on the date certain (App. Ex. 31, p. 5 and Sch. JPF-3).

The only point of agreement seems to be among those who conducted a physical inspection of the Zimmer plant. Reliance on this test provides firm support for a finding that the project meets the 75 percent standard. Company witness Chaney made an inspection of the plant on November 10, 1978 and another on February 27, 1979; it was his opinion that the project was 75 percent complete at the date certain (App. Ex. 11, pp. 5-7; IV, 20-23, 27). Mr. Fenstermaker also testified that his inspection just before

the date certain proved that the plant was more than 75 percent complete (III, 15-16).

The Staff also conducted a physical inspection of the Zimmer plant, and found the plant to be in excess of 75 percent complete at the date certain (Staff Ex. 4, p. 14; XI, 128). Consumers' Counsel raised questions as to the quality of the inspection, but we do not believe that the testimony warrants a rejection of the Staff's conclusion.

Although we have been given opinions, not only by each party to this proceeding but by each witness, as to the most appropriate method for determining percent completion, we do not believe that it is necessary to pick one particular method in order to reach our determination. The weight of the testimony on this issue indicates that the Zimmer project was 75 percent complete at the date certain.

Having resolved the question of whether Zimmer is 75 percent complete, we must now determine whether or not to include an allowance for this project in the rate base in this proceeding. The Staff has recommended that it not be included; Mr. Jerry L. Wissman testified that allowing a project to be included in the rate base before it becomes productive "neither promotes an economically efficient use of resources nor properly allocates risk between investors and consumers" (Staff Ex. 7, pp. 13-14). The City concurs, and presented testimony from Mr. A. Scott Rothey on the economic effects of the decision of whether or not to include CWIP in rate base. Although Mr. Rothey admitted that it was difficult to quantify the effects of that decision, one way or the other, and would only opine that including CWIP does not *necessarily* increase the financial strength of a utility, he recommended that CWIP not be included on the basis that a company should not be permitted to earn a return on a non-productive asset (City Ex. 4, pp. 53-55). Mr. Hagstrom, testifying for Consumers' Counsel,

also recommended against including Zimmer, on the basis of his analysis of C&SOE's financial condition. His review of the company's interest coverage ratios, its current and projected capital structure, and its future financing requirements led him to the determination that the inclusion of Zimmer is not necessary to maintain the company's financial integrity (OCC Ex. 6, p. 12).

The company, on the other hand, presented extensive testimony that the inclusion of Zimmer is necessary to maintain its financial integrity. Mr. John F. Utley presented his view on the salutary effects of including CWIP in the rate base; specifically that it would reduce attrition and business risk, and that it would improve cash flow and debt coverage (App. Ex. 10, p. 7). Based on his analysis of the relevant "financial indicators," he suggests that the maximum amount of CWIP allowed by Section 4909.15(A)(1) of the Revised Code be included in the rate base (*Id.*, p. 9). Mr. Charles A. Benore testified that C&SOE's financial integrity is "substantially inferior" to that of the Standard Poor's industrial companies and of other investor-owned electric utilities (App. Ex. 16, pp. 7-8).

Those taking positions on both sides of this issue point to criteria used by this Commission in previous cases in deciding on an allowance for CWIP, and argue that application of those criteria in this case militate either for or against the inclusion of Zimmer in the rate base. However, we have been careful to indicate that the exercise of the discretion vested in this Commission by the General Assembly in this area must be based on the specific facts of a particular case.

Although the Revised Code is very specific with regard to the valuation of a utility's property to be included in the rate base, the Commission is given discretion in determining the amount of an allowance for CWIP. The only limitation on the allowance is that it not exceed

twenty percent of the total valuation of property, not including the CWIP; the statute gives no other guidelines to be used in determining the amount of the allowance. We believe that the statute contemplates that the Commission may include all or none of the dollars associated with those projects, or any amount in between which it determines to be a reasonable allowance, once it has found that the particular construction projects to be represented by the allowance are at least 75 percent complete. Although the recommendations of those testifying on the issue have been to include all of Zimmer or nothing, we believe that it is reasonable to include a portion of the dollars associated with the Zimmer project in the CWIP allowance.

We have, in past cases, indicated our view that the allowance for CWIP was intended as a mechanism for recognizing that extremely expensive plant necessary to assure continuity of service may take many years to bring on line, and that, in some cases, it may be appropriate that the revenue authorized take that fact into account. The facts of this case indicate that it is appropriate to do so here. The testimony in this record leads to the conclusion that the company's construction program has been a major factor in the deterioration of its financial condition. In the last ten years, C&SOE has more than tripled the amount of its total capital; as of the end of 1978, the annual cash requirement to pay interest and dividends on the permanent capital was approximately $100 million (App. Ex. 14, pp. 11, 12). The delay of the in-service date for Zimmer and the additional projected expenditures on the project are due to factors that are not within the control of this company, or even of the project leader, CG&E. The testimony in this case is that the best estimate of the in-service date for Zimmer is January 1981. The company has indicated that it will most likely be filing another rate

case by 1981 (VII, 64); even so, any relief granted in that case would not be effective until at least the end of that year. We can, therefore, conclude, on the basis of the record in this case, that Zimmer will be providing service for about half of the period during which the rates set herein will be effective. Given the circumstances of this case, we conclude that a reasonable allowance for CWIP should include 50 percent of the amount of CWIP attributable to the Zimmer project.

Four of the projects which were listed by the company as CWIP were determined by the Staff to be replacement projects and were, therefore, excluded by the Staff from its recommended allowance for CWIP (Staff Ex. 1, p. 25). On brief, the company argues that all four of the projects will increase C&SOE's net plant investment, and that they should be included as CWIP (App. Brief, p. 26). It is conceded that Project No. 78-333 is a "true replacement" but the company requests that it be in the rate base anyway, as it is a necessary part of a larger project (App. Ex. 31, p. 7). The question of whether replacement projects should be included in CWIP has arisen in several recent cases; we have, in each case, affirmed our decision in *Ohio Edison Co.*, Case No. 77-1249-EL-AIR *et al.* (Opinion and Order, November 17, 1978), that this is a relevant consideration, and we have, in all cases, excluded such projects. *See Dayton Power and Light Co.*, Case No. 78-92-EL-AIR (Opinion and Order, March 9, 1979); *Cleveland Electric Illuminating Co.*, Case No. 78-677-EL-AIR (Opinion and Order, May 2, 1979). The testimony in this case provides no compelling reason to depart from that position in this case.

Three other projects were found to be less than 75 percent complete and excluded from the CWIP allowance as proposed in the Staff Report. However, Mr. Bassett testified that an error had been made and that Project

77-451 was, in fact, 75 percent complete as of the date certain (Staff Ex. 4, p. 11). That project should be included, but the other two projects, 77-134 and 77-838, will not be included in the CWIP allowance, as per the Staff recommendation.

Consistent with foregoing discussion, the Commission finds that the proper allowance for construction work in progress for purposes of this proceeding is $92,479,000.

Working Capital

The company, the Staff and Consumers' Counsel have each proposed an allowance for working capital to be included in C&SOE's rate base valuation, in accordance with Section 4909.15(A) (1) of the Revised Code. All three have used the formula approach, but each has treated various of the components differently. The company requests an allowance of $46,107,000 (App. Ex. 19, Sch. 11). Consumers' Counsel's calculation resulted in a proposed allowance of $22,224,000 (OCC Ex. 6, Sch. 3). The Staff originally proposed an allowance of $39,076,000 (Staff Ex. 1, Sch. 11). However, at hearing, Mr. Hanna revised the figure to $35,476,000 (XIII, 116).

There are several reasons for the disparity in the recommended allowances. The first is that all three of the parties calculated the fuel component differently, with a resulting significant disparity between the figures arrived at by the Staff and Consumers' Counsel. The Staff based its fuel consumption estimate on the level of consumption resulting from the full utilization of the company's generating plants, while Consumers' Counsel based its figure on normal utilization. Mr. Hagstrom explained that he used actual consumption levels for 1978, adjusted for the anticipated increase in KWH sales during the test year (OCC Ex. 6, p. 20). However, it is apparent that Mr.

Hagstrom did not consider all of the company's fuel requirement in his calculation (XVI, 106-107).

Although Mr. Bassett's testimony on this subject was a bit confusing, it appears that his calculation was based upon the company's normal inventory requirements, priced at the cost at date certain. This method for determining the fuel stock element of working capital is more appropriate than basing the determination on consumption levels. Although Mr. Hagstrom asserts that the "actual level of fuel supply that is maintained at each plant site is based on anticipated operating levels" (OCC Ex. 6, p. 20), he provides no support for the conclusion that KWH sales alone should be used in the calculation of fuel stock. We believe that it is reasonable to determine a fuel inventory with more than just the amount of fuel necessary to provide the KWH sales. We will accept the Staff's figure.

The company objects to the Staff's failure to include prepayments in its working capital calculation, and relies on the fact that prepayments were included in the company's last rate case, pointing to Mr. Hanna's testimony that there should be consistency from company to company and from case to case (Staff Ex. 5, p. 20; App. Ex. 30, p. 28).

We have, in two recent cases, accepted the Staff's view that exclusion of prepayments from the cash component of working capital is not unreasonable. *Dayton Power and Light Co.*, Case No. 78-92-EL-AIR (Opinion and Order, May 2, 1979); *Cleveland Electric Illuminating Company*, Case No. 78-677-EL-AIR (Opinion and Order, May 2, 1979). We did so in the DP&L case even though prepayments had been included in that company's previous rate case; we do not believe that because we included prepayments in C&SOE's last case, we are thereby precluded from adopting a different position on the issue in this one. On the contrary, we are once again, as we were

in the *DP&L and CEI* cases persuaded by the arguments presented by Mr. Hanna that prepayments should not be included. In adopting the formula method of determining working capital, this Commission has cited as one of its virtues that it provides a reasonable estimate of the working capital requirement without necessitating a detailed lead-lag study. Mr. Hanna points out that selective adjustments to the formula are not justified, and that to make such adjustments is to ascribe a precision to the formula method which it does not have (Staff Ex. 5, p. 20). We accept that view, and conclude that prepayments should not be included.

Consumers' Counsel recommends an adjustment to the working capital allowance for the interest expense lag (OCC Ex. 6, Sch. 6). That, too, would be deducted from working capital to account for the fact that interest expense on long-term debt is paid only twice a year and generally recovered through rates prior to the time its paid. As we have indicated, the formula method attempts to take into account both leads and lags, and we have accepted the proposition that selective adjustments should not be made. We, therefore, reject Consumers' Counsel's proposed adjustment.

A major difference between the figures presented results from the treatment of gross receipts tax. The company objects to the inclusion of gross receipts tax in the tax offset to working capital, which is recommended by both the Staff and Consumer's Counsel. The company argues that the taxes are prepaid and they do not therefore provide the company with a source of working capital (App. Ex. 30, p. 33).

Mr. Hagstrom, conceding that there is a dispute as to whether or not the tax is prepaid, included gross receipts tax in the tax offset, based on his view that although the tax may be prepaid by about 190 days, other elements of

operating taxes have a lag longer than that which would offset the prepayment (OCC Ex. 6, p. 23). He contends that it is necessary to include all operating taxes in the offset, in order to account for all of the components, which have differing leads and lags.

The Staff's position is that the gross receipts tax is not prepaid, and we must agree. Prior to the passage of House Bill 230, gross receipts taxes were considered as a part of the tax offset to working capital. In *Toledo Edison Co.*, Case No. 73-706-Y (Opinion and Order, August 1, 1975), the Commission specifically determined that contrary to the applicant's argument, state excise taxes were not prepaid. With the passage of House Bill 230, this Commission took the position that the "no adjustment" language* added to Section 4909.15(A)(1) of the Revised Code prevented the inclusion of gross receipts tax in the offset to working capital [*See Ohio Power Co.*, Case No. 78-676-EL-AIR (Entry on Rehearing, June 6, 1979)]. Now that the language has been deleted by the passage of Amended Substitute House Bill 657, the Commission can, and will, return to the treatment of gross receipts tax as an offset to working capital. The change in the payment schedule set forth in House Bill 230 did not transform the tax into a prepaid item, but simply accelerated the payment schedule and reduced the lag between collection of the tax through revenues and payment of the tax by the company.

Customer Deposits

Although the company did not deduct customer deposits from its proposed working capital allowance, it is clear that such a deduction must be made. In *Consumers'*

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* ". . . no adjustment in the cash working capital requirements of the utility, as otherwise determined by the Commission, shall be made as a result of the excise tax payment schedule required under division (C) of Section 5727.31 of the Revised Code."

Counsel v. Pub. Util. Comm., 58 Ohio St. 2d 108 (1979), the Ohio Supreme Court held that customer deposits represent a non-investor supplied source of capital and that the amount of customer deposits should be deducted from rate base or used as an offset to working capital. Both the Staff and Consumers' Counsel made a deduction from working capital of $975,000, which was the average test year balance (Staff Ex. 1, Sch. 11; OCC Ex. 6, p. 24 and Sch. 3). That deduction is proper, and is approved.

The following schedule presents the Commission's determination of the allowance for working capital to be included in rate base for the purpose of this proceeding. The figures take into account the adjustments necessary to reflect the disposition of those other issues in this case which affect the working capital allowance.

Jurisdictional Working Capital Allowance

(000's omitted)

Cash Element –	
⅛ of Adjusted Operation and Maintenance Expense, excluding fuel and purchased power	$12,485
Fuel Stock Element	26,303
Materials and Supplies	7,134
Deduction –	
¼ of Adjusted Taxes, other than FICA	(8,993)
Customer Deposits	(975)
Jurisdictional Working Capital Allowance	$35,954

Property Held for Future Use

The company requests that plant held for future use in the amount of $2,010,000 be included in the approved rate base (App. Ex. 3, Sch. B-1). Although conceding that such property is not actually being used, Mr. Heimann contends that the property is useful and of benefit to C&SOE's customers through reduced future costs, and

points to orders from the Federal Energy Regulatory Commission permitting the inclusion of land and land rights purchased for future use in the rate base (App. Ex. 9, p. 5). Regardless of what the FERC may do, we are constrained by statute to only permit plant that is used and useful at date certain to be included in rate base. The company's proposed inclusion of $2,010,000 should be denied.

Customer Advances for Construction

The rate base recommended by the Staff reflects a deduction of the jurisdictional portion of the date certain balance of customer advances for construction (Staff Ex. 1, Sch. 12). This deduction is based on the determination that that balance represents customer supplied funds, on which rate payers should not now have to pay a return (Staff Ex. 5, p. 21). Although the company objected to this deduction, it did not pursue the issue at the hearing or raise it in the brief. Consumers' Counsel witness Hagstrom accepted the Staff's adjustment (OCC Ex. 6, Sch. 1).

As we pointed out in our decision in Case No. 77-545-El-AIR, customer advances clearly fall within amounts received as total or partial defrayal of the cost of the company's property, which must be deducted from the rate base in accordance with Section 4909.05(I) of the Revised Code. The rate base deduction of $58,000 is, therefore, approved.

Deferred Income Taxes and Investment Tax Credits

The Staff has reduced the rate base for the jurisdictional portion of the date certain balance of accumulated deferred taxes due to accelerated amortization and depreciation, the pre-1975 investment tax credits and the 4 percent portion of the 1975 credit, and 4 percent of the investment tax credit on qualified progress expenditures for CWIP projects at date certain (Staff Ex. 1, p. 28 and

Sch. 12.1). The company objects to the adjustment for investment tax credits, arguing that the proposed rate base deduction is inconsistent with the Internal Revenue Code and this Commission's decision in the company's last rate case, and that it could result in the loss of all of C&SOE's investment tax credits for open tax return years (App. Brief, p. 48).

There can be no argument that the reduction of rate base for certain of the investment tax credits may jeopardize the availability of those credits pursuant to provisions of the Internal Revenue Code. The Staff is aware of those provisions, and has recommended that only a portion of the ITC balances be used to reduce the rate base.

As we found in the last case, the company elected Option 3 under Section 46 of the Internal Revenue Code (26 U.S.C., Section 46) which governs the treatment of investment tax credits for regulated companies. Under that option, a company is not subjected to the risk of loss of the benefits of the investment tax credit should a commission use the credits to reduce the rate base. This election was applicable to the pre-1975 4 percent credit and to the 4 percent portion of the 1975 credit.

The Staff did not include in its deduction the 6 percent additional credit allowed under the 1975 amendment to the Code, recognizing that the company elected Option 2 on that additional credit.

The Staff included the 4 percent portion of the 1975 credit on qualified progress expenditures based on its view that the 1975 Tax Reduction Act did not speak to the treatment of the credit for rate-making purposes (Staff Ex. 5, p. 23). The company contends that the Staff treatment would violate Section 46(f)(8) of the Internal Revenue Code, which says, the company concedes, that the rate base deduction must be computed as though the 1975 and

subsequent acts had not been passed (App. Ex. 30, p. 37). Mr. Hanna has done just that, by only excluding the 4 percent portion (Staff Ex. 5, p. 24).

The company points out that the treatment of investment tax credits in this case is inconsistent with the Staff's position in the last rate case, apparently arguing that inconsistency alone jeopardizes the availability of the credits (App. Ex. 30, pp. 38-39). We disagree. We recognize that the position taken in this case differs from that which was adopted in Case No. 77-545-EL-AIR. However, some time after that decision was issued, faced with inconsistencies in several Commission orders, we resolved this issue, deciding that the federal income tax expense should reflect a full year's amortization of deferred investment tax credits in addition to a rate base deduction for the credits. *Toledo Edison Co.*, Cases No. 76-1174-EL-AIR and 76-1061-EL-AIR (Entry on Rehearing, July 26, 1978).

The Staff treatment of investment tax credits is therefore in accordance with recent Commission decisions on this issue. A rate base deduction is proper and will not, in our opinion, result in a loss of credits for C&SOE. We accept the adjustment proposed by the Staff.

Consumers' Counsel contends that there should also be a deduction from rate base for deferred income taxes resulting from the tax timing differences for property taxes. Mr. Hagstrom suggests that, despite the flow-through of the increment in property tax as a current tax saving, there is a permanent deferral which should be recognized as a rate base deduction.

This same argument was raised by Consumers' Counsel in *Ohio Power Co.*, Case No. 78-676-EL-AIR, and was, in that case rejected. We believe that the same result should obtain in this case. The property tax timing difference is of short duration and is not cumulative. There

was no suggestion in the record that timing difference has created a "balance" which could be reinvested in plant, and hence be subject to deduction from the rate base pursuant to Section 4909.05(I) of the Revised Code, which is the basis of the rate base deductions approved herein.

Operating Reserves

Consumers' Counsel proposes a $2,191,000 deduction from rate base for operating reserves (OCC Ex. 6, p. 27). It is Mr. Hagstrom's position that the reserves "represent an accumulation of expenses which have been charged through the income statement and for which a cash payment has never been made," and that the difference between the accrued expense and the amount paid is cost-free capital (OCC Ex. 6, p. 26).

The company responds that Consumers' Counsel is, in effect, asking the Commission to deviate from the formula used to determine working capital by applying operating reserves against the cash requirement, and that the Commission should not do so (App. Ex. 30, p. 40). We agree with the company's view and believe that the record does not indicate that the amount of the proposed deduction is available to the company for reinvestment in its property. We, therefore, reject the proposed adjustment for rate base.

Allocations

Because this case involves both an application for an increase in rates throughout C&SOE's service territory and a complaint and appeal from the City of Columbus municipal ordinance, it is necessary to allocate a portion of the rate base to the City of Columbus in order to determine whether the ordinance rates are reasonable. William R. Chaney, testifying for the applicant, developed the allocation factors used by the company, which were reviewed and accepted as reasonable by the Staff (Staff Ex. 1, p. 4;

XII, 34, 72). The City of Columbus objects to the allocation factors, contending that the rates proposed to be charged to customers within the city are not based on the costs to serve those customers.

To determine the allocations between jurisdictional customers served under the Columbus ordinance rates and those not served pursuant to ordinance, Mr. Chaney went through several steps, and used two allocation methods. Initially, he split the total company into jurisdictional and non-jurisdictional by use of the twelve month coincident peak responsibility method (IV, 39, 106). He then separated the sum of the coincident peak demands into components for primary, secondary and transmission level service (IV, 40, 107). In order to allocate the primary and secondary between ordinance and non-ordinance customers, Mr. Chaney used the non-coincident class peak demand method (IV, 107). Transmission was directly assigned to the city.

The last step of the allocation process was to use the average and excess method to establish the responsibility by class of service within the City of Columbus (IV, 40). The results of that allocation procedure were applied to customers outside of Columbus as well (IV, 42). That step indicates Mr. Chaney's implicit assumption that there are no differences in the cost to serve customers inside and outside of the city.

It is that assumption which the City of Columbus challenges. City witness Lawrence R. Thompson testified that he did not take issue with the manner in which cost elements were separated prior to allocation nor with the method used to allocate capacity costs; he indicated that he did not believe that the combination of three methods produced serious distortions (City Ex. 3, p. 2, 3-4). However, upon a review of the company's cost of service study, Mr. Thompson concluded that "the study was not done in

a manner capable of recognizing cost differences which might exist for consumers inside the City of Columbus, as compared to other customers of the company" (City Ex. 3, p. 1).

In order to correct for that problem, Mr. Thompson computed weighting factors which he would apply to the company's "average data" to arrive at an estimate of cost of service differentials between customers within and outside of Columbus. In doing so, he relied on a study done by the Ohio Edison Company in order to estimate the cost differences relating to distribution property (City Ex. 3, p. 9).

He began with ordinance and non-ordinance weighting factors for certain of Ohio Edison's property accounts, and translated that into a ratio of customers in towns over 10,000 in population and all other customers. He applied that ratio to the same groups for C&SOE, and used that as a basis for developing a relationship between Columbus consumers and all others (XV, 48, 51-54).

It is clear that there are several factors which could affect the applicability of Ohio Edison data to the C&SOE system which Mr. Thompson did not take into account. He conceded that one factor might be the extent to which customers within the service territory of each are served by other companies; he did not, however, make such a determination (XV, 41). He stated that the existence of municipal distribution systems may be relevant if a significant portion of a city's consumers were served through such a system, but he did not know if there were customers included in the over 10,000 classification which are served through municipal systems (XV, 33, 37). Mr. Chaney reviewed Mr. Thompson's work papers, and concluded that the characteristics of Ohio Edison's rural customers were attributed to a large number of C&SOE's urban customers (App. Ex. 32, p. 4).

Mr. Thompson, commenting on Mr. Chaney's analysis, opined that Mr. Chaney had not considered any difference in costs between urban and rural areas. Mr. Chaney testified that he had considered numerous relevant factors, and that he concluded that "they tend to offset each other insofar as the allocation of costs to the city is concerned" (App. Ex. 32, p. 8). He considered the results of Mr. Thompson's analysis as support for his conclusion, pointing out that there was only about a 3.4 percent difference in the dollars of return produced under the company and the city proposed rates (App. Ex. 32, p. 8).

Considering all of the evidence submitted on this issue, we must conclude that the allocation factors as proposed by the company are not unreasonable. Although Mr. Thompson's attempt to estimate the cost differentials for the City of Columbus and the rest of C&SOE's territory was inventive, we cannot conclude that his results are correct.

Rate Base Summary

In light of the foregoing, the Commission finds the jurisdictional statutory rate base as of the date certain, February 28, 1979, to be as set forth on the following table. This schedule also shows the allocation of rate base based on the factors as approved above.

(000's omitted)

	Total Jurisdiction	Area covered by Application	City of Columbus
Plant in Service	$1,154,929	$595,979	$558,950
Depreciation Reserve	253,284	130,785	122,499
Net Plant in Service	901,645	465,194	436,451
Plus:			
CWIP	92,479	47,560	44,919
Working Capital	35,954	18,519	17,435
Less:			
Accumulated Deferred Taxes and Tax Credits	24,438	12,610	11,828
Customer Advances for Construction	59	30	29
Rate Base	$1,005,581	$518,633	$486,948

OPERATING INCOME

The figures on test year operating income provided by the company reflect six months of actual data and six months of forecasted data for the second half of the test year. The Staff recommends adjustments to the company's figures which it considers necessary to make the operating income determination appropriate as a basis for setting rates in this proceeding. Consumers' Counsel offered further adjustments to the company's presentation of test year accounts.

REVENUES

Load Management Customer Billing Credit

Both the company and the Staff have excluded from operating revenues load management billing credits which were given during the test year, but which were applicable to consumption which occurred prior to the test year (Staff Ex. 1, p. 7 and Sch. 3.2; App. Ex. 20, Sch. C-3.2; XX, 11).

But, as with several other adjustments to operating income, there is disagreement as to the proper numbers to use in calculating the adjustment.

The Staff, in making the calculation of the adjustment, used the actual credit as booked, while the number used by the company in its six and six filing was an estimate. It is alleged by the company that the Staff's use of actual numbers results in a mismatch between the adjustment and the item to be adjusted (App. Ex. 30, p. 3).

We believe that the Staff's adjustment is proper. The Staff's adjustment does two things; it excludes from operating revenues a portion of the credit applicable to a period prior to the test year, which is what the company's adjustment accomplishes, and it includes an actual amount rather than the estimate of the credit used by the company. The calculation subtracts both portions from the estimate used in the company's test year unadjusted operating income. The Staff's computation results not in a mismatch, but in an additional adjustment which we believe to be proper. We accept the Staff's calculation of this adjustment.

Fuel adjustment clause reconciliation adjustment

The company has proposed an adjustment to remove from test year revenues the amount applicable to a reconciliation adjustment ordered by this Commission in its January 10, 1979 Opinion and Order in Case No. 78-627-EL-FAC. The revenues were collected during the test year, but were applicable to a period prior to the test year. The Staff agreed that the adjustment was necessary, but recommended a different calculation (Staff Ex. 1, Sch. 3.3).

The two points on which the applicant and the Staff disagree are the determination of total jurisdictional sales, exclusive of primary medium general service, for February 1979, and the determination of the multiplier used to con-

vert total metered KWH to what was actually billed to customers (App. Ex. 30, Sch. RAH-R-2).

The Staff has used proposed rates, including street lighting KWH sales which are not currently included in jurisdictional sales, and the proposed multiplier rather than the current multiplier which was applicable to the test year. The company argues that because the reconciliation adjustment was a one time correction, the elimination of out-of-period revenues should be calculated on the basis of current rate tariffs in order to exclude the revenues at the rate at which they were collected during the test year (App. Ex. 30, p. 4). However, the Staff contends that because fuel revenues were calculated using KWH sales and the multiplier proposed in this case, the adjustment should be calculated on the same basis (Staff Ex. 3, p. 6).

It is with this item that the question of a mismatch arises, and it appears that it is the company's adjustment that results in a mismatch between fuel revenues and the elimination of the amount attributable to the reconciliation adjustment (Staff Ex. 3, p. 6). We believe that the Staff's adjustment is properly calculated, and should be adopted.

Fuel cost revenue adjustment

Both the applicant and the Staff agree that an adjustment must be made to test year revenues, to account for the two month lag in the operation of C&SOE's fuel adjustment clause. Because there is a two month lag between the incurrence of fuel expenses and the recovery of the associated revenue, an adjustment must be made to properly match test year revenue and expenses. Although the method used by the company and the Staff is the same, different figures were used by each in the determination of the amount of the adjustment.

In calculating the adjustment, the company used six months of actual fuel costs and six months of estimated

charges, while the Staff used eight months of actual costs (Staff Ex. 1, p. 8; App. Ex. 30, p. 6). The company contends that the Staff's method results in an improper matching between revenues and expenses, because the expenses are based on six months estimated and six months actual figures (App. Ex. 30, p. 6). Mr. Montgomery, testifying for the Staff, explained that because of C&SOE's two month billing lag, the Staff had available eight months of actual fuel cost factors which he felt ought to be used (XI, 91).

We believe that the matching principle is recognized by the methodology of this adjustment, on which the Staff and the company agree. We do not understand how the use of actual versus estimated data has anything to do with that matching principle for the purpose of this adjustment. However, we do feel that the Staff's adjustment is appropriate; there is no reason why the eight months of actual fuel cost factors which were available should not be used.

EXPENSES

Zimmer Operating Expense

The company has proposed an adjustment to operating expenses to reflect its estimate of the effect of operating Zimmer Unit No. 1. It argues that the increase in test year operating expenses of $9.8 million is the annualized effect of increases in depreciation, property taxes, and operation and maintenance expense and of decreases in fuel costs (App. Ex. 20, Sch. C-3.5; App. Ex. 9, p. 10). The Staff did not include the effects of the adjustment in its calculation of test year operating income, and Consumers' Counsel asks the Commission to reject the company's proposal (OCC Ex. 6, p. 30).

The Commission has long held that when asked to adjust for changes which occur subsequent to the end of the test year, it requires that the changes be known and

measurable, and not merely speculative. *See e.g., General Telephone Co. of Ohio,* Case No. 73-492-Y (Opinion and Order, July 31, 1975). Clearly, the requested adjustment does not meet that standard. All of the elements of the adjustment depend upon the Zimmer unit being in service; it is clear from the company's brief that the magnitude of the adjustment depends upon the unit's in-service dates (App's. brief, p. 57). As the unit is not yet in service, and will not be until January of 1981, we must reject the proposed adjustment.

Out of period adjustments

The Staff adjusted operating expenses to eliminate certain items which were recorded during the test year but which were applicable to periods prior to the test year (Staff Ex. 1, Schs. 3.12a - 3.12d). The company argues that the items in question are caused by the normal process of operating a business, and result from withholding payment to ensure that work had been performed in compliance with requirements, or because of disputes with vendors (App. Ex. 30, p. 11). It is contended that the Staff adjustments, if adopted, would distort the total costs for the test period.

The items for which the Staff adjusts are not the typical out of period expenses with which this Commission has dealt in numerous decisions. Rather than an unusual occurrence outside the test period, or a request to increase the level of a test year expense for a post-test year increase, these items result from the normal business operations of the company and the lag which often occurs between the incurrence of an expense, and the booking of the expense item. We agree with the company's position that if the adjustments recommended by the Staff were adopted, test year expenses would not be representative of future periods, and the company would never be compensated for

those types of expenses. We will not, therefore, adopt the Staff's recommended adjustment.

Overstated Forecasted labor adjustment

The Staff made an adjustment to the company's labor expense to reflect a reduction in the labor force from that which was forecasted in the six months of estimated data (Staff Ex. 1, p. 11 and Sch. 3.10). The Staff determined that 97 of the employees forecasted had not been hired during the test year, and likened the use of the higher forecast to an indirect post-test year six month adjustment (Staff Ex. 3, p. 8).

The company objects to the Staff's adjustment, arguing that the Staff was simply interested in the actual level of labor for the test year, and that the actual number of employees during that period is not indicative of the normal operations of the company. Company witnesses explained that C&SOE reduced its labor force prior to and during the test year because of its deteriorating financial condition, and that the forecasted level will be more representative of the number of employees during the period the rates set in this proceeding will be in effect (App. Ex. 30, pp. 9-10; App. Ex. 31, p. 17).

We have recognized, in our determination of C&SOE's emergency case, that the company had reduced its operating and maintenance expenses to the minimum level possible without severely affecting the level of service to its customers (Case No. 78-1439-EL-AEM, Opinion and Order of February 29, 1979). We do not believe that it is reasonable, in attempting to determine a representative level of expenses, to hold the company to the levels in effect during its financial emergency. As we pointed out in our decision in Case No. 77-545-EL-AIR: "forecasted results of operations provide an appropriate basis for establishing rates in that the projections, if properly made, may provide

a more representative portrayal of the company's ongoing experience than would the actual figures for the estimated portion of the test period." Opinion and Order, at 5. We believe that this approach is applicable to certain of the expense items which were affected by the cutbacks made by C&SOE during its financial emergency.

For that reason, we must reject the Staff's adjustment to the company's labor expense, and the related adjustments which flowed therefrom. However, we must also reject the company's attempt to increase the test year labor expense by $841,000 during the presentation of its rebuttal case (App. Ex. 30, p. 10). The company did not provide sufficient explanation of why the 3,000 average employee level was more appropriate than the projected levels as shown in the company's original filing.

Annualization of Labor Increase

Both the company and the Staff have annualized labor expenses to reflect a wage increase that was effective July 1, 1979. There is a difference of $414,183 in the two calculations, however; the Staff did not include overstated forecasted labor, overtime, or the CCD labor in its annualization adjustment (Staff Ex. 1, p. 11).

The company contends that the Staff's adjustment ignores the fact that it will be paying overtime in the future, and that it will be paying higher wages to CG&E and DP&L employees (App. Ex. 30, pp. 12-14). It may well be true that payment of overtime wages results in lower overall labor costs than would the hiring of extra employees. And we do not disagree with the company's assertion that a certain amount of overtime is a reality in the electric utility industry. It is in recognition of that fact that overtime is considered a reasonable and proper test year expense. What the Staff has done in this adjustment is exclude

only the annualization of the test year overtime expense at higher levels, and we adopt the Staff's adjustment. This Commission has stated, on numerous occasions, that annualization adjustments will be approved only when the increased costs are known with specificity and are beyond the control of the company. Increased overtime costs do not fit into that category. *Dayton Power and Light Co.*, Case No. 78-92-EL-AIR (Opinion and Order, March 9, 1979).

The adjustment for CCD labor involves an annualization adjustment for an April 1, 1979 CG&E wage increase and a post-test year adjustment for an increase in DP&L wages effective September 2, 1979 (App. Ex. 30, Sch. RAH-R-5A). The company proposes that the CG&E increase be annualized in the same fashion as its own. Mr. Montgomery conceded that he would not be opposed to the annualization adjustment if it were calculated based on the level and the effective date of CG&E's increase, and not simply on C&SOE's increase (XI, 36). However, the information necessary to correctly calculate the adjustment was not provided. Therefore, the company's proposal should be rejected.

The post-test year adjustment for the DP&L wage increase should also be rejected. This Commission has determined that the use of more current test periods has obviated the necessity of making numerous post-test year adjustments. *Dayton Power and Light Co.*, 76-88-GA-AIR (Opinion and Order, July 22, 1977).

In view of our determination regarding the Staff's overstated forecasted labor adjustment, the annualization of labor increases should be adjusted to eliminate the Staff's adjustment for overstated labor. With that change, the Staff's calculation is accepted.

Tree-trimming expense

The company proposed a $1,712,361 adjustment to operating expenses for tree-trimming (App. Ex. 31, Sch. JPF-4). The Staff has recommended disallowing the adjustment (Staff Ex. 3, p. 14) and Consumers' Counsel, while agreeing that an adjustment is necessary, suggests that the proper amount of the adjustment is $1,228,768 (OCC Ex. 6, p. 32).

The Staff's view is that the company's adjustment should not be made without also considering related expenses, such as storm damage expenses, which the company has not done. In criticizing that position, Mr. Fenstermaker asserted that the Staff has "incorrectly assumed that at the time the company stops trimming trees there is a direct, equivalent increase in storm damage expenses." Mr. Fenstermaker went on to say that in fact, the storm damage increases would occur one and a half to two years later and that "[t]herefore, there has not been abnormally high storm damage in the test year" (App. Ex. 31, p. 19).

However, Mr. Fenstermaker also testified that the company began to cut back its tree trimming in 1974, and that the reduced maintenance continued until 1978 (XX, 50). Therefore, the question seems to be not whether there is excess storm damage expense during the test year, but how much.

Mr. Hagstrom was troubled not so much by the fact that no adjustment was made to related expenses, but because the figure used by the company was "an unprecedented high level of expenditure" (OCC Ex. 6, p. 32). Recognizing that the unadjusted booked expense, accepted by the Staff, was the lowest level in the last five years, Mr. Hagstrom adjusted the booked expense for the years 1974 to 1978 by an inflation factor of seven per cent, and took

the average (OCC. Ex. 6, p. 32). The company contends that the booked expenses were too low, because of the cutbacks, and that the inflation factor is more realistically 10.375 per cent (App. Ex. 31, p. 19).

We believe that the company's adjustment should be approved. The Staff's proposal ignores, once again, the financial problems of the company and its impact on test year expenses, a condition which Mr. Hagstrom recognized and which prompted him to calculate his own adjustment. However, even that calculation resulted in what we consider to be a conservative determination. Although it does appear that the storm damage expense may be overstated slightly, that fact does not warrant accepting the Staff's figures, which clearly reflect an unrepresentative level of tree-trimming expense.

Uncollectible Expense Adjustment

In adjusting the test year uncollectible accounts expenses to reflect other revenue adjustments, the Staff used a percentage factor of .586, which was the factor used by C&SOE in its six and six filing in this case (Staff Ex. 1, Sch. 3.13). The company now objects to the use of that rate, which was being used as of March 31, 1979, and recommends use of the latest known rate of .625 per cent, based on the twelve months ended September 30, 1979 (App. Ex. 30, p. 15). The company contends that the new rate will be more representative of the period during which the rates will be in effect.

The company's contention may well be true, but we have no way of knowing that for certain. The .586 percent figure was used by the company in its filing and was examined by the Staff to determine whether it was appropriate for the test year. Mr. Montgomery was satisfied that .586 percent was a reasonable number, and was not given

the opportunity to analyze the figure presented by the company on rebuttal (XI, 54a). We accept the adjustment as calculated by the Staff.

Rate Case Expense

The Company's proposed allowance for rate case expense is $455,000 which represents expenses associated with this case and the unamortized expenses of prior rate cases (App. Ex. 20, Sch. C-9). The Staff eliminated the expenses from prior cases, and amortized the current rate case expenses over two years, the period proposed by the company (Staff Ex. 1, p. 12 and Sch. 3.17). Consumers' Counsel would eliminate all rate case expense on the ground that this expense should be borne by the company's shareholders (OCC Ex. 5, p. 8).

We have consistently held that rate cases are an ordinary and necessary part of the operations of a public utility and must be recognized as an allowable expense. Therefore, we must dispose of Consumers' Counsel's objection. However, unrecovered expenses from prior cases should not be built into the rate case expense approved in this proceeding. As we explained in C&SOE's last rate case, the function of the allowance for rate case expense, like the allowance for any other expense item, "is not to guarantee the dollar-for-dollar recovery of specific actual expenses, but rather to establish a reasonable allowance for a normal and necessary utility function" Case No. 77-545-EL-AIR (Opinion and Order, March 31, 1978), at 24. Therefore, the Staff's adjustment should be adopted.

Advertising Expenses

C&SOE originally proposed an allowance for advertising expenses of $328,000 (App. Ex. 20, Sch. C-8). However, at hearing, the company revised its request, eliminat-

ing $268,000 of institutional advertising expenses (App. Ex. 23A, 23B; II, 85; II, 116). The remainder, representing "essential non-promotional advertising," is now requested as an includable operating expense (App. Brief, p. 79).

The Staff concurred with the company's advertising expenses, except for $16,479, the amount attributable to advertising for Zimmer No. 1, which the Staff argues should be eliminated because Zimmer is not yet in service (Staff Ex. 1, p. 12 and Sch. 3.16). Consumers' Counsel contends that all advertising expenses should be eliminated from test year expenses (OCC Ex. 5, p. 9).

We have, on numerous occasions, indicated our view that a reasonable allowance for non-promotional advertising may be included in test year expenses. However, we realize that the negative reaction of the general public to institutional advertising by public utilities may offset any improvement to the corporate image which the ads are meant to obtain, and in our recent decision in *Cleveland Electric Illuminating Co.,* Case No. 78-677-EL-AIR, we adopted a recommendation by the Staff that institutional advertising expenses be limited to .2 percent of total operating revenues (Opinion and Order, May 2, 1979). In this case, C&SOE has gone further by eliminating the entire expense for institutional advertising, and we wholeheartedly endorse the company's action.

The remaining expense should be allowed. Having eliminated the $268,000 from its total company expense, C&SOE now requests $47,000 in advertising expense (App. Brief, p. 79). That figure, which apparently reflects an additional reduction of $13,000 representing Zimmer advertising expenses, is reasonable, and should be included in allowable operating expenses.

Charitable Contributions

The company requests a jurisdictional allowance of $159,151 for charitable contributions (App. Ex. 20, Sch. C-7). The Staff used the same number in its test year expenses, having determined that that allowance does not exceed the limitation which this Commission has applied to charitable contributions of .1 percent of total gross revenue (Staff Ex. 1, p. 12). Consumers' Counsel argues that charitable contributions should not be included in operating expenses for ratemaking purposes because these expenditures do not provide a direct benefit to ratepayers nor are they necessary to enable the company to provide electric service (OCC, Ex. 5, p. 8).

The argument presented is familiar, but insufficient to persuade the Commission to depart from the position taken in *Cleveland Electric Illuminating Company,* Case No. 71-634-Y (1973), and affirmed in all cases since then, that charitable contributions which are reasonable in amount and of benefit to communities within the utility's service area are proper business expenses. The expense requested by C&SOE meets those qualifications (App. Ex. 9, p. 11).

As we have indicated in several other cases, the allowance for charitable contributions is largely a policy matter, and the Commission is guided in its determination by House Concurrent Resolution No. 24 of the 110th General Assembly, in which the General Assembly urged the Commission to allow charitable contributions as an expense in determining utility rates. The inclusion of this expense has also been upheld as reasonable on appeal. *City of Cincinnati v. Pub. Util. Comm.*, 55 Ohio St. 2d 168, 378 N.E.2d 729 (1978). The allowance requested by the company will be approved.

Ohio Coal Consumption Tax

Both the company and the Staff adjusted test year expenses to eliminate the coal consumption tax expense, as a result of the Ohio Supreme Court's decision in *Dayton Power and Light Co. v. Lindley*, 58 Ohio St. 2d 465 (1979) finding that the tax is unconstitutional (App. Ex. Sch. C-4; Staff Ex. 1, Sch. 3.7). The Staff's adjustment was based on information provided by the company in Staff Data Request No. 90, but Mr. Heimann testified that that information was in error, and provided corrections showing that the adjustment for total company should be $927,000 rather than $1,263,000 (App. Ex. 30, p. 8). No objections were raised to that revised number, and we will accept that as the proper amount of the adjustment.

FICA Tax

The Staff's adjustment for the FICA tax, as indicated on Schedule 3.21d of the Staff Report (Staff Ex. 1), was in error, as only ten months of expense was included in the test year operation and maintenance labor figures (XI, 50). Mr. Montgomery supplied a revised schedule, which corrected that error. We accept the Staff's revised figure, as adjusted for our determination regarding test year labor expense.

Property tax expense

The Staff adjusted the company's property tax expense, applying the latest known tax rate (the actual 1977 lien date rate) to the date certain property valuation (Staff Ex. 1, p. 13 and Sch. 3.21a). At hearing, Mr. Montgomery agreed that if the actual 1978 lien date rate were to become available before this Opinion and Order were issued, then that new actual rate should be used to determine the expense item (XI, 60). The company contends that if that new rate is not known, an estimate of

the 1978 rate should be used rather than the actual 1977 rate. It is argued that if the Staff's calculation is accepted, the expense will be based on a rate which is two years out of phase, a mismatch which will ensure earnings erosion (App. Ex. 9, pp. 13-14; App. Ex. 30, p. 17). The company proposes the use of an estimated rate calculated by adding the average increase over the last three years to the 1977 lien date rate (App. Ex. 9, p. 13).

We do not believe that using an estimate of the next tax rate is reasonable. Ohio law requires that known changes in tax laws after the test year must be recognized. *East Ohio Gas Co. v. Pub. Util. Comm.*, 133 Ohio St. 212, 12 N.E.2d 765 (1938). However, speculation regarding the new rate is not a proper basis for a post-test year adjustment. We therefore accept the Staff's adjustment for this item.

Interperiod Tax Allocation

In Case No. 77-545-EL-AIR, this Commission authorized C&SOE to change from flow-through accounting to a method of partial normalization. Both the company and the Staff propose to continue to allow the company to normalize the tax effects of material tax timing differences. However, the company requests that the Commission approve comprehensive interperiod tax allocation, permitting normalization of the difference between tax accelerated depreciation and book, rather than tax, straight line depreciation, for all of the company's property, whenever acquired. The Staff recommends against adoption of the company's proposal and, instead, recommends partial interperiod tax allocation, which would recognize the timing effect of tax accelerated, over tax straight line, depreciation on 1977 property additions forward. In addition, the Staff would have the Commission approve normalization of the interest costs associated with construction,

excluding that which is associated with CWIP which may be included in the rate base, and ratable flow through of investment tax credits (Staff Ex. 1, p. 14).

In all recent major electric rate cases, this Commission has approved some form of interperiod tax allocation, finding that normalization recognizes the true current costs of service and ultimately benefits all customers. No party to this proceeding disputes the fact that normalization spreads the cost associated with the using up of the tax reducing capability of depreciable property to all customers served by that property, or that the increased internal cash flow from normalization benefits C&SOE's customers (App. Ex. 9, p. 18; App. Ex. 10, pp. 9-11). The company simply argues that the Staff has not gone far enough in recognizing those benefits.

The Staff's proposal is consistent with previous Commission decisions on this issue, and we are not persuaded to change our position. As we indicated in the last case, we believe that the additions forward method strikes the fairest balance between the interests of the company and those of its customers. (See Staff Ex. 5, pp. 9-10). We believe this to be an appropriate criteria in deciding an issue on which the Commission has been given discretion. And, too, we believe that use of tax lives rather than book lives is a reasonable method of determining the amount to be normalized. Use of the tax guideline lives of the property to be considered is consistent with the method specified by federal tax law in Regulation Nos. 1.167(1)-1 and 1.167(1)-1(h). *See DP&L*, Case No. 76-88-GA-AIR (Opinion and Order, July 22, 1977). It also prevents certain problems which may occur with the use of book lives. Consistent with our previous decisions on this issue, we adopt the Staff's recommendations.

Unrecovered Purchased Power Costs

C&SOE seeks to recover, in this proceeding, $6,056,524 in purchased power costs to be collected via an Interim Schedule for a temporary surcharge. The costs were incurred during the emergency period of January, February and March of 1978, when the electric utilities in Ohio were ordered by this Commission to purchase power in order to protect remaining fuel supplies. C&SOE recovered a portion of its total expenditures through its fuel adjustment clause, and asks the Commission to approve its Interim Schedule, Supplement No. 22 in order to recover the balance attributable to jurisdictional customers (App. Ex. 17, p. 5; App. Ex. 6, Sch. E-1, p. 27).

This issue was raised by the Ohio Edison Company in Case No. 77-1249-EL-AIR *et al.* We rejected the company's proposed surcharge, explaining at length our position. To put it simply, we do not believe that we must reimburse utility companies for past losses or provide a 100 percent recovery of past expenses even if they were incurred at the direction of the Commission. The company's proposd Interim Schedule should not be approved.

Operating Income Summary

Consistent with the foregoing discussion, the Commission finds the revenues, expenses and operating income for the test year to be as set forth on the following table. The allocation of these items is based on the factors approved above.

(000's omitted)

	Total Jurisdiction	Area Covered by Application	City of Columbus
Operating Revenues	$366,350	$188,897	$177,453
Operating Expenses			
Operation & Maintenance	213,661	110,125	103,536
Depreciation Expense	36,916	19,257	17,659
Taxes other than Income Taxes	37,324	19,229	18,095
Federal Income Taxes	7,076	3,665	3,411
Total Operating Expenses	$294,977	$152,276	$142,701
Net Operating Income	$ 71,373	$ 36,621	$ 34,752

PROPOSED INCREASE

A comparison of jurisdictional test year operating revenues of $366,450,000 with allowable jurisdictional expenses of $294,977,000 indicates that under present rates, the company realized income available for fixed charges in the amount of $71,373,000, based on adjusted test year operations. Applying that dollar return to the jurisdictional rate base of $1,005,581,000 results in a rate of return of 7.10 percent. Applying the dollar return applicable to the application area of $36,621,000 to the allocated rate base of $518,633,000 results in a rate of return of 7.06 percent. Current rates to customers in the City of Columbus, which are the same as those contained in the ordinance from which an appeal has been taken, resulted in test year net operating income of $34,752,000. This dollar return, when applied to the rate base allocated to the city of $486,948,000, produced a rate of return of 7.14 percent. These rates of return are below that recommended as reasonable by any of the expert witnesses testifying on this subject, and the Commission therefore finds that the company's present rates are insufficient to

provide it reasonable compensation and return for the electric service it renders. Ordinance 105-79, which would continue these current rates in effect in the City of Columbus, must also be found to be unreasonable. Rate relief is required, and the ordinance complained of must be modified.

Under the rates proposed by the company, additional gross annual revenues of $126,591,000 would have been realized, based on test year operations as analyzed herein. On a pro forma basis, which assumes necessary expense adjustments calculated in a manner consistent with the Commission's findings, this increase in gross revenues would have yielded an increase in net operating income of $33,413,000, resulting in income available for fixed charges of $70,034,000 for the area covered by the application. In the City of Columbus, the increase in revenues would have produced a $31,849,000 increase in net operating income, yielding income available for fixed charges of $66,601,000. Applying the dollar return for the application area to its allocated portion of the rate base yields a rate of return of 13.50 percent. The dollar return for the City of Columbus applied to the rate base allocated to the city results in a 13.68 percent rate of return. For the total jurisdiction, the proposed rate would generate a 13.59 percent rate of return. It is clear that the increase proposed by the company results in a rate of return in excess of that proposed as reasonable by any of the witnesses testifying on this issue. Therefore, the Commission must examine these recommendations in order to determine a fair rate of return.

RATE OF RETURN

The Commission has before it four rate of return recommendations, each based on a cost of capital analysis. John M. Emery, testifying for the company, recommends

an 11.27 percent rate of return (App. Ex. 14, p. 28). Staff witness Jerry L. Wissman proposes a range of from 10.25 percent to 10.55 percent as the overall cost of capital (Staff Ex. 7, p. 3). Donald J. Trawicki, Consumers' Counsel's rate of return witness, recommends a range of 10.30 percent to 10.36 percent (OCC Ex. 7A, Sch. 18). The recommendation from A. Scott Rothey, testifying for the city, is 9.52 percent (City Ex. 4, Sch. VII).

Capital Structure

None of those presenting testimony on the rate of return agreed on the capital structure which should be used. Although three of the four agree on the use of the date certain, their recommendations differ for other reasons.

Consumers' Counsel suggests that short-term debt be included as a component of the capital structure, based on Mr. Trawicki's conclusion that short-term debt is a permanent source of capital for financing a portion of the company's assets (XVII, 22). We have held on numerous occasions that short-term debt will generally not be considered in determining the capital structure of a utility, and nothing in this record compels us to adopt a different view in this case.

Mr. Rothey suggests that deferred investment tax credits and deferred income taxes be included in the capital structure as zero cost components. He concedes that adoption of this recommendation would require elimination of the practice of deducting deferred investment tax credits from the rate base, which deduction has been approved in this case; he maintains that including the deferred credits in the capitalization would more accurately recognize the benefits received by the company in the form of an interest-free loan from the federal government (City Ex. 4, p. 29). We believe that the rate base adjust-

ment which has been made accounts for the benefits of the company's deferred investment tax credits; Mr. Rothey's testimony does not adequately support his contention that an adjustment to the capital structure, rather than to the rate base, is a better means of doing so. We will, therefore, reject Mr. Rothey's recommended capital structure.

In several recent cases, the Commission has approved the use of a capital structure which reflects changes in the capitalization ratios after the date certain. We have recognized that this is an appropriate step toward recognition of the actual cost of capital to the company in the period for which rates are being set. Because Mr. Wissman has presented a capital structure which incorporates the changes which have resulted from activity after the date certain, we will adopt the Staff's recommendation.

Cost of Debt and of Preferred Stock

All four parties agree that the embedded cost of preferred stock as of the date certain is 8.77 percent. However, the parties do not agree on the embedded cost of long-term debt.

Mr. Rothey's determination that the cost should be 8.06 percent was arrived at by eliminating the interest on a post date certain bond issue, for which he did not have sufficient information, and interest on the company's land notes, because the Staff has recommended that certain portions of land be excluded from plant in service (City Ex. 4, p. 9). It became apparent on cross-examination that Mr. Rothey's knowledge regarding the land notes did not provide a sufficient basis on which to make that judgment (XVII, 105). We cannot conclude that the interest on those notes should be eliminated.

Mr. Trawicki determined the cost of long-term debt by taking the company's calculation at date certain, with-

out making any adjustments for post date certain occurrences (OCC Ex. 7, Sch. 2). The Company adjusted its calculation for the refunding of a $20 million issue on June 1, 1979 at 10.25 percent interest (App. Ex. 5, Sch. D-3). The Staff's determination updated the company's calculation to incorporate a September 1979, 10.25 First Mortgage Bond issue of $60 million, and the annual interest costs of the August 1978 and June 1969 term notes were changed to reflect the current prime rate (Staff Ex. 7, p. 4). The company requests that the Commission adopt the Staff's 8.56 percent figure as the most current cost calculation (App. Brief, p. 112). As we have adopted the Staff's recommended capital structure for purposes of this proceeding, it is proper to assign to the debt component of that capital structure the Staff's recommended cost of debt.

We will adopt an 8.56 percent embedded cost of debt and an 8.77 percent cost of preferred stock for the purpose of determining the cost of capital in this case.

Cost of Equity

There are a variety of methods available to the experts who are asked to estimate the cost of equity component of the cost of capital. Dr. Charles F. Phillips, Jr., testifying for the company on this issue, recommends a 15.0 percent cost of equity, based upon the comparable earnings approach (App. Ex. 15, p. 40). Mr. Wissman, using the discounted cash flow (DCF) method, arrived at a cost of equity of 13.39 to 14.27 percent (Staff Ex. 7, p. 3). Mr. Trawicki used both of those methods; he recommends a 13.74 to 13.92 percent return on equity (OCC Ex. 7, p. 52). A 12.5 percent cost of equity was arrived at by Mr. Rothey by use of the DCF method (City Ex. 4, Sch. VII).

Dr. Phillips examined the earnings on book common equity of the Standard and Poor's 400 industrials and Moody's 24 Utilities, and determined that industrial earn-

ings were 14.5 percent and 14.6 percent in 1976 and 1977, and utilities were earning 10.7 percent in 1976 and 11.11 percent in 1977 (App. Ex. 15, pp. 34, 35).

Dr. Phillips maintains that comparison with earnings of other regulated utilities is unreliable (App. Ex. 15, pp. 33-34). He examined the relative risk between utility and industrial common equity, and concluded that the risks attendant to an investment in utility common equity are about the same as, or slightly higher than, the risk of investing in the equity of an average industrial (App. Ex. 15, p. 39), pointing to, among other things, the effects of inflation, the substantial capital investments necessitated by new environmental regulations and the need to meet service obligations, and the deterioration of utility finances as causes of the increased perception of risk. He concluded that most of the factors which have affected the utility industry apply specifically to C&SOE. From that determination, he judged that a 15 percent return for C&SOE would be in line with the average earnings of industrial firms over the last three years, and with their 1979 projected earnings.

The comparable earnings approach is founded on the proposition that the cost of equity capital is the opportunity cost to the investor; in order to enable a company to attract capital, the return authorized must be commensurate with the return produced by alternative investments with comparable risk. The selection of companies for comparison is therefore a significant factor in this analysis. It is clear that Dr. Phillips' determination of the relative risks of C&SOE and the Standard and Poor's industrials is based on the exercise of his judgment, as he used no quantifiable measure of risk in his analysis (V, 82). We believe that Dr. Phillips' analysis is inappropriate for determining C&SOE's cost of equity.

We recognize the danger of determining a rate of return solely with reference to return earned by other regulated utilities. However, we believe it to be unreasonable to totally disregard the actual experience of other utility companies. Consideration of the regulated industry would lead to different conclusions regarding the cost of equity. Mr. Trawicki, using a combination of risk measures, concluded that the risk of C&SOE is comparable to the electric and gas composites, and that it has a business risk less than that of the industrials but a greater financial risk (OCC Ex. 7, p. 25). Giving weight to the reduced earnings in 1978, Mr. Trawicki determined that C&SOE should earn a return between that of the normalized electric utilities and the industrial utilities.

Mr. Trawicki also used the discounted cash flow (DCF) formula to arrive at this recommendation of an appropriate return on equity, as did Mr. Wissman and Mr. Rothey. The use of DCF methodology has been approved by this Commission in a long series of cases. Although Mr. Wissman recommended a range of 13.39 to 14.27 percent, a wider range than Mr. Trawicki's 13.77 to 14.07 percent, the midpoints of the ranges were the same. Mr. Rothey determined the cost of equity to be 12.5 percent, lower than the recommendations of the other two witnesses relying on the DCF method; however, the growth rate employed in his analysis was determined by the use of the utility industry as a whole.

Upon a review of the evidence presented, we are of the opinion that the recommendation of Mr. Wissman as to the cost of equity should be adopted. Although the base line cost of equity as determined by Mr. Wissman was within the range of Mr. Trawicki's baseline range, Mr. Trawicki adjusted only the dividend yield to allow for market pressure and the cost of financing. Mr. Wissman applied a 3.2 to 10 percent adjustment to his 12.91 percent

base line cost. We have often approved an adjustment to account for flotation costs and market pressure, applied to the baseline cost of equity. *See, e.g., Dayton Power & Light Company,* Case No. 78-92-EL-AIR (Opinion and Order, March 9, 1979).

Further, we believe that the rate of return should reflect a return on equity at the upper end of the Staff's recommended range. We note the testimony of Mr. Benore and Mr. Emery regarding the company's current financial situation, and we believe that a return on equity at the upper end of the range is necessary to provide the company with sufficient financial flexibility, after accounting for the costs associated with marketing common stock and the market pressure attendant to its issuance, to enable it to assure investor confidence. We conclude, therefore, that a 14.27 percent cost of equity should be employed in determining the appropriate rate of return.

Attrition Allowance

The company has requested that the Commission approve a .5 percent attrition allowance, to be applied to the overall cost of capital. It is the company's view, as expressed by Mr. Emery, that given the current level of general inflation and the "specific additional inflationary forces impacting on the utility industry", C&SOE will not have sufficient load growth to allow it to earn the rate of return authorized (App. Ex. 14, p. 27).

This Commission has, in past cases, rejected the applications of an attrition allowance, and we believe that under normal circumstances, such an adjustment to the cost of capital is unnecessary. However, it is clear that these times are unusual; the condition of the economy, of the utility industry in general, and of C&SOE are such that we believe that this company will not be able to earn its cost of capital

without such an adjustment. Although we have long stated that this Commission cannot and should not guarantee a particular rate of return, we believe that the circumstances of this case warrant the grant of an attrition allowance in order to allow C&SOE even the opportunity to earn its cost of capital.

The effects of inflation and high interest rates have increased the embedded cost of senior capital, reducing the amount available as return on equity capital, and have caused a decline in interest coverages (App. Ex. 15, p. 38). Inflation causes particular problems for regulated utilities, which cannot immediately raise prices to combat its effects, and which must continue to provide full service to their customers (App. Ex. 15, p. 38).

Much of the testimony in this case went to the issue of C&SOE's financial integrity, and it is clear that the condition of the company is not good. Mr. Benore, using several tests of financial integrity, determined that the company's financial integrity is "substantially inferior" to industrials and electric utilities in general (App. Ex. 16, pp. 7-8). The fact that C&SOE has been in emergency situations twice in the last six years indicates that this company has had problems earning its authorized rate of return, and that the likelihood is that such problems are continuing. Mr. Trawicki pointed out, in his testimony, that he was adjusting his cost of equity, to make it "prospective in nature", to account not only for inflation, but also for the problems associated with the construction of nuclear generating facilities (OCC Ex. 7, p. 26).

Any one of these factors may not be a sufficient basis for granting the attrition allowance requested. It is the combination of all of the factors discussed above that leads us to the conclusion that it is reasonable to do so. However, we cannot apply the adjustment as requested. Section 4909.15(D)(2)(a) of the Revised Code requires that

this Commission determine a rate of return "with reference to a cost of debt equal to the actual embedded cost of debt. . ." We believe that to apply an attrition adjustment to the overall cost of capital would be to violate the dictate of that statutory provision. It is not unreasonable, however, to apply a .5 percent attrition allowance to the costs of C&SOE's proprietary capital. Therefore, in determining the rate of return, 9.27 percent will be applied to the preferred equity component of the capital structure and 14.77 percent will be applied to the common equity portion.

Summary

Applying a cost of common equity of 14.27 percent to the equity component of the capital structure approved herein, and applying our finding of an 8.56 percent cost of debt and an 8.77 percent cost of preferred equity to the capital structure, and adding an attrition allowance of .5 percent to the cost of proprietary capital, produces a weighted cost of capital of 10.79 percent. The Commission concludes that a rate of return of 10.79 percent is sufficient to provide to C&SOE reasonable compensation for the electric service it renders to customers affected by this application and complaint and appeal.

AUTHORIZED INCREASE

A rate of return of 10.79 percent applied to the rate base of $1,005,581,000 approved for the purpose of this proceeding results in an allowable return of $108,502,000. Certain expenses must be adjusted if the gross revenue authorized is to produce this dollar return. These adjustments, which have been calculated in a manner consistent with the findings made in this Opinion and Order, result in an increase in federal income tax of $31,628,000, in state excise tax of $2,841,000, and in the allowance for uncollectibles of $422,000. The net effect of these adjust-

ments is to increase allowable expenses to $329,868,000. Adding the approved dollar return to these allowable expenses results in a finding that the company is entitled to place rates in effect which will generate $438,370,000 in gross annual operating revenue. This represents an increase of $72,020,000 over the revenues which would be realized under C&SOE's present permanent rate schedules. Similar calculations with respect to the application area and the City of Columbus indicate that increases of $37,512,000 and $34,508,000 will be required. The $72,020,000 figure includes amounts currently being collected pursuant to the company's emergency surcharge. The surcharge should be terminated upon the effective date of the tariffs filed pursuant to this Opinion and Order.

Through its objections to the Staff Report, Consumers' Counsel has raised the question of whether the increase requested by the company complies with the guidelines promulgated by the Council on Wage and Price Stability. As the increase granted is less than was requested, the relevant inquiry is whether the authorized increase is within those guidelines. Mr. Miller did testify that the authorized increase should follow the established guidelines (OCC Ex. 5, p. 9); however, no testimony was provided as to the level of rate relief which would comply.

As we have stated in several recent orders, this Commission must act on applications for rate increases in accordance with state law, and we do not believe that the voluntary price standards can limit the level of rate relief which this Commission may grant as a result of applying the statutory rate making formula. We note that the Michigan Public Service Commission, giving consideration to this same matter, has made a similar observation regarding the requirements of Michigan state law and the federal constitution. *In the Matter of the Application of Indiana and Michigan Electric Company for authority to increase*

its rates for the sale of electric energy, Case No. 7-5608 (Opinion and Order, April 10, 1979).

Powerplant Productivity

The Staff has raised a significant issue in its discussion of power plant productivity. Although we have not accepted the Staff's recommended adjustment to rate base for excess capacity, there exists the potential for alleviating the problem at which such a recommendation is aimed by concentrating on the improved productivity of existing units. The Staff conducted an analysis of the operating statistics of C&SOE's baseload units and concluded that the possibility exists for improving the performance of most of those units (Staff Ex. 1, p. 41). Dr. Mark Gerber, testifying for the Staff, has identified the benefits of improved power plant productivity as reduced fuel charges, more reliable service at the generation level, and a decrease in the need for new capacity (Staff Ex. 6, p. 5).

We have indicated, elsewhere in this Opinion and Order, that we believe C&SOE's construction program to be a major cause of its financial difficulties. Although any approach which is shown to produce benefits to the utility above its costs should be pursued, a program which could lead to a reduction in the need to obtain capital to finance new construction would be of particular benefit to C&SOE.

We do not quarrel with the company's suggestion that any problems it may have with the productivity of its units have been exacerbated by its financial emergency. However, with the grant of emergency, and now permanent, rate relief, the company should be able to improve its maintenance program. The first step toward the goal of improved powerplant productivity, and the basis for the needed cost-benefit analysis (XIV, 63), is the collection of accurate and useful information, and the Staff's recommendations in this case are geared toward only that first step.

We believe that those recommendations should be implemented. The company should collect accurate operating information and develop equivalent operating availability goals or standards for each of its generating units, and should file quarterly reports on these matters with the Commission. In implementing these recommendations, the company should work with the Staff to ensure that the necessary information is obtained and filed.

REFUND OF EMERGENCY SURCHARGE

In the Opinion and Order in C&SOE's emergency case, the Commission indicated that the emergency surcharge granted in that case would be subject to refund on two bases. First, if the level of relief in that case had exceeded the increase granted in this case, the excess would have been subject to refund. As that is not the case, no refund will be necessary.

However, it does appear that a refund will result on the second basis. The surcharge was made subject to refund with respect to any excess over the amount of operating income which was deemed necessary in that case to alleviate C&SOE's financial emergency. A motion was made by the City of Columbus at the outset of the hearing to consider the amount of the refund in this proceeding.*

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* We note that the city's motion went to determination of the issue of whether or not the level of relief granted in the emergency case "was more than was needed to avert the financial emergency" (I, 22). Although we are not dealing with the substance of the refund issue in this order, we do wish to clarify that the issue raised by the City is *not* the issue which is still pending for determination. In our grant of the emergency surcharge, we made a determination as to the level of operating income which was necessary to prevent a financial emergency; we explicitly found that an additional $32.8 million in revenues for 1979 was necessary in order for the company to achieve the necessary operating income. For an explanation of the way in which the refund will be calculated, see the April 25, 1979 Entry in Case No. 78-1439-EL-AEM.

The Examiner overruled the motion, on the ground that the data necessary to make that determination would not be available until after the permanent rates become effective. That ruling was proper, as the Commission is not yet in receipt of operating income figures for November and December of 1979. However, we believe it to be appropriate to indicate here that a preliminary review of information received from the company indicates that based on the twelve months ended October 1979, a refund of approximately $4.4 million will be necessary. That figure will have to be adjusted when all appropriate information is received.

RATES AND TARIFFS

A number of questions have been raised with regard to rate structure, the design of specific rates, and certain other tariff provisions. The analysis of these issues is, to some extent, affected by the fact that the revenue authorized is significantly less than the amount which the proposed rate schedules were designed to generate. Thus it will be necessary to speak in terms of general principles rather than specific rate levels. The tariffs filed pursuant to this Opinion and Order will be carefully reviewed prior to final approval to ensure that the Commission's intent has been carried out.

Allocation of Revenue Responsibility

The revenue distribution reflected in the company's proposed rates generally retains the existing allocation of revenue responsibility. After a review of the cost of service study conducted by Mr. Chaney for C&SOE, the Staff determined that the proposed allocation of revenue responsibility was a "reasonable representation of the cost associated with the rendition of service" (Staff Ex. 1, p. 56). The Staff also reviewed the revenue generated by each customer class under current rates, the assignment of in-

creased revenues, and the revenue responsibility under proposed rates (Staff Ex. 2, p. 10); the conclusion reached was that the proposed revenue distribution is reasonable (Staff Ex. 2, p. 11).

Consumers' Counsel contests the proposed revenue distribution, arguing that the differential between proposed industrial and residential rates is too high, and is greater than the differential that exists in current rates, and that insufficient support for such a differential has been provided (OCC Ex. 8, p. 5).

OCC witness Ben Johnson concluded that the cost of service study performed by the company did not provide a reasonable basis for the allocation of revenue responsibility. In his opinion, a substantial portion of the costs of generating plant should be allocated based on KWH generation and sales; his conclusion was that the company's allocation was based on coincident system peak demand (OCC Ex. 8, p. 14).

Mr. Johnson's conclusion has proved to be erroneous. He took the view, initially held by several of the other witnesses commenting on this matter, that Mr. Chaney had allocated costs to customer classes based on their relative contribution to the twelve monthly coincident peak demands (OCC Ex. 8, p. 12). However, it is now clear that Mr. Chaney used the average and excess method to allocate costs to the various classes (IV, 41). There was agreement among several of the witnesses in this proceeding that the use of that method results in the allocation of a portion of the dollars on the basis of kilowatt hour sales; Mr. Chaney testified that over 55 percent of the capacity related costs have been allocated between customer classes on that basis (App. Ex. 32, p. 15).

Mr. Johnson makes what he terms a "conservative" recommendation; that is, to allocate the overall revenue

increase to the residential class on the basis of its proportionate share of total jurisdictional kilowatt hour sales (OCC Ex. 8, p. 21). Mr. Joseph Herz, presenting testimoney on behalf of the Ohio Council of Retail Merchants, indicates that such an allocation methodology ignores the manner in which costs are incurred, which would lead to revenue instability, cross-subsidization between and within customer classes, and the inability of customers to predict the cost of electric service (OCRM Ex. 1, p. 7). Mr. Johnson himself acknowledges that at least some portion of production capacity costs should be allocated on the basis of peak demand (OCC Ex. 8, pp. 13, 14).

We conclude that Mr. Johnson's recommendation should not be adopted. The adjustment has not been shown to be necessary, as his conclusion regarding the company's allocations were erroneous, and the substance of the recommendation does not provide a reasonable basis for the distribution of the revenue increase.

In preparing the tarrifs to be filed pursuant to this order, the company should assign revenue responsibility in the same manner as originally proposed, except as noted *infra* regarding the distribution within the residential class.

Residential Rate Schedules

Declining Block Rates:

Consumers' Counsel has objected to the retention of a tail block in the residential winter rate schedule for usage over 800 KWH. Mr. Johnson contends that the company's proposal may be interpreted as an attempt to promote the use of electricity for space heating, which "runs counter to the national trend towards eliminating such promotional discounts" (OCC Ex. 8, p. 43). He argues that if the tail block is associated with space heating usage, that block should have a higher rate than the initial block. He finds

that usage in that block, rather than being off-peak, as the company has suggested, is either peak or shoulder, pointing out that the lowest peak KW demands and the lowest KWH usage are not experienced during the winter (OCC Ex. 8, p. 43-44).

Mr. Chaney indicated that he would not agree that the winter residental rates are declining block rates; he termed them "separate flat rates with an off-peak seasonal differential for a particular type of service that applies to a very few number of customers" (V, 25). He terms the lower rate for usage over 800 KWH as an incremental rate for space heating service, and explains that the basic premise for that rate is the conservation of scarce oil fuels. The Staff proposes the retention of the declining block rate because the elimination of that rate would have too great an impact on customer bills (Staff Ex. 2, p. 24).

Mr. Chaney arrived at the proposed rate of 1.8¢ per KWH by starting with the current 1.5¢ per KWH rate, which was based on heat pump load characteristics, and adjusted for the inflation which has occurred since the studies presented in support of the 1.5¢ rate in the last case (App. Ex. 11, p. 53). He conceded that he had taken into consideration the increases in the cost of fuel oil which have occurred since the last case in making his recommendation, while acknowledging that the space heating rate should be competitive with oil (IV, 172; V, 27).

We don't believe that it is unreasonable to maintain this feature of the winter residential rate schedule; even Mr. Johnson does not insist that the rate be uniform (OCC Ex. 8, p. 47). However, it is clear that the level of the tail block rate does not accomplish the purpose for which the block is intended. As the revenue authorized in this case is less than that on which the proposed rates are based, the schedules will have to be redesigned; in that process, the

discrepancy between the tail block and the rest of the schedule should be decreased, to make the rate for space heating service more competitive with the current cost of oil.

Small-use load management rate:

In Case No. 77-545-EL-AIR, we approved the small use load management rate for C&SOE, over the objection of the Staff. The company proposes to continue to offer this rate. Mr. Douglas R. Maag, testifying for the Staff, recommends that this rate be eliminated, arguing, as did the Staff in the last case, that the rate is not cost justified (Staff Ex. 1, p. 61). The city, the Association and Intervenor Willis object to the Staff's recommendation.*

Mr. Maag's analysis apparently did not take sales to small-use residential customers and compare revenues de-

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* On brief, the Association argues that the examiner erred in excluding the portion of the testimony of its expert witness, David E. Jones, dealing with the issue of the small-use rate. In its brief, the Association cites the Court's opinion in *Chesapeake & Ohio Ry. Co v. Pub. Util. Comm.*, 163 Ohio St. 252, 126 N.E.2d 314 (1955), as authority for the proposition that this Commission is not bound, as courts are, by the strict rules as to the admissibility of evidence. It is true that the case does say that. However, as a reading of the case would indicate, the Court went on to say: " . . . Such freedom from inhibition may not be distorted into a complete disregard for the essential rules of evidence by which rights are asserted or defended." at 263. The Court found that much of the testimony presented at the hearing was incompetent. The Association does not even attempt to argue that the testimony was credible or should be given great weight; it simply contends that the issue of the verification of the study on which Mr. Jones relied should go to the weight of his testimony and not to its admissibility. We cannot say that the examiner erred in excluding the testimony, as that is in essence the same as giving it no weight at all, which is what we would have had to do even if it had been admitted: the Association failed to offer any testimony regarding the validity of the study on which Mr. Jones relied.

rived from those sales at the regular residental rate and at the RR-1 rate; rather, he applied the small-use rate to the first 800 KWH for regular residential bills (X, 40). Mr. Chaney made the comparison of revenues for small-use residential consumption at RR and RR-1 rates, and found that the differential approximates the cost difference computed by examining load factor differentials (App. Ex. 32, pp. 10-12). It appears that the cost differential found by Mr. Maag is the difference between the air conditioning and heating peaks, and not the difference between air conditioning and non-air conditioning customers (XXI, 14).

The elimination of the small-use rate would increase charges to the customers now on that rate by about 48 percent (X, 95). Mr. Maag conceded that his recommendation to consolidate the RR and RR-1 rate schedules was "not without reservation" (X, 96). We, too, have reservations about such an increase, especially in light of the fact that the Staff's analysis was not without some problems. We will, therefore, not require the combination of the current RR and RR-1 rates.

The Staff proposes that if the RR-1 schedule is not merged with the RR schedule, the procedures for qualifying for the RR-1 rate be modified such that, essentially, the presumptions are shifted toward the small-use rate. As it stands now, a new customer is placed on the regular residential rate; he must demonstrate that he qualifies for the small-use load management rate by maintaining his usage below 700 KWH throughout a summer billing period. The Staff recommends that a new customer automatically be placed on the small-use rate, and that he continue on that rate until his usage indicates that the standard rate is applicable instead (Staff Ex. 2, p. 33).

The Staff's concern that a customer might exceed the 700 KWH threshold in the early summer months and

thereby preclude his qualification for the RR-1 rate for more than a year fails to recognize that the 700 kilowatt-hours per month ceiling has a 100 KWH "buffer" built in; the RR-1 rate schedule is designed to recognize those residential customers who normally use no more than 600 KWH per month during the summer billing period (App. Ex. 11, p. 51; IX, 31, 36). Usage in excess of the 700 KWH threshold for a month during the summer billing period would strongly suggest the use of air conditioning equipment. The Commission finds that the Applicant's procedures for determining the applicability of the small-use rate to any particular customer are reasonable and that a change is not warranted based upon the evidence of this record.

Customer charge:

The company proposes to increase the residential customer charges; it recommends an $8.00 charge for the RR schedule and $4.00 for the RR-1 customers. Mr. Chaney explained that his first concern was revenue stability; to meet that criteria he felt it necessary to increase the customer charge by an amount greater than the system-wide average for all cost increases, and he arrived at the proposed $8.00 charge (IV, 158). Subsequently, examining customer-related costs from the cost of service study, he confirmed that the proposed charge was reasonable. The same was done with the RR-1 customer charge (IV, 160).

The Staff has recommended that even if the small-use and regular residential rates continue to be made available, the customer charges in both rates be the same (Staff Ex. 2, p. 27). We agree with Mr. Maag's premise that the customer charge, the purpose of which is to reflect fixed costs, should not vary with differences in usage. Although it appears that there is not complete agreement among the experts in this area as to the extent of the costs to be

reflected in the customer charge, it does seem that the consensus is that the costs should be those which vary with the number of customers, and not with the level of power consumption. *See, e.g.*, J. Bonbright, *Principles of Public Utility Rates* (1961). The company has not provided sufficient justification for a differential in customer charges between the RR and RR-1 rate schedules.

Mr. Maag explained the manner in which the Staff's recommended uniform customer charge of $5.00 was determined (Staff Ex. 2, p. 23; X, 41). Although Mr. Maag apparently did not include certain capacity costs in his calculation (taxes or return on investment), we find Mr. Maag's calculation to be a reasonable one, and we adopt the Staff's recommendation of a uniform $5.00 customer charge for both the RR and RR-1 rate schedules.

Residential revenue distribution:

The Staff recommends to the Commission that if the separate RR and RR-1 schedules are maintained, the current revenue distribution be maintained, rather than that which is proposed by the company, which would result in an increase in the discrepancy between the revenues from the two rates (Staff Ex. 2, p. 32). While we believe that maintenance of the two rates is reasonable, we agree that there is no reason at this time to increase the divergence between the two rates. The tariffs filed by the company pursuant to this Opinion and Order should reflect the maintenance of the current revenue distribution between the regular and small-use residential rates.

Delayed Payment Charge:

Applicant proposes to include in its tariffs applicable to residential customers a provision for a delayed payment charge in the manner as proposed in the rate proceedings immediately prior to the instant case. The issue is amply

addressed in the Opinion and Order of that prior case (Opinion and Order of March 31, 1978; Case No. 77-545-EL-AIR). Company support for the proposal suffers from the same infirmities detailed in the above-referenced Opinion and Order. As an example, the apparent derivation of a percentage figure is simply that which is incorporated in other company tariff schedules and thus not related to any estimates concerning costs of collection V, 33; *see also* Opinion and Order in Case No. 77-545-EL-AIR). There continues to be no quantitative estimate with respect to the effect on company revenues in the event such a charge were approved as proposed (V, 75). Hence, the Commission rationale enunciated in the 77-545-EL-AIR Opinion remains applicable in the context of these proceedings. The delayed payment charge as proposed, applicable to residental customers, will not be approved. The Commission directs that no delayed payment charge be incorporated in the residental rate schedule filed pursuant to this Order.

General Service Schedules

The company proposes to continue to offer small, medium and large general service rate schedules, which all incorporate demand and energy charges. The Medium and Large General Service demand charges per unit decline with larger loads; the energy charges vary according to load factor. The Medium General Service rate, as proposed by the company, contains additional energy blocks, with declining rates for those blocks. In the Staff Report, a Medium General Service rate different from that of the company was proposed, which eliminated declining demand energy charge (Staff Ex. 1, p. 65). However, Mr. Maag conceded that this schedule is applicable to customers with a wide variety of usage characteristics, and that the rates proposed by the Staff could lead to inconsistency

in expense recovery which might be rectified by a redesign of the demand charges (Staff Ex. 2, p. 37). Mr. Chaney testified that a flat charge would not recognize the variations in load and usage patterns (X, 65).

The company, the Staff, the city and the industrial and commercial intervenors entered into a stipulation which reflects their agreement to a modification of the Medium General Service Schedule (Joint Ex. 1 and 1A). The design of that schedule recognizes the variety of load and usage characteristics of the customers which receive service pursuant to the schedule, and provides for an equitable assessment of the costs. We will accept the stipulation, and direct that the Medium General Service rate schedule reflect the rate design features which are indicated in Joint Exhibit 1A.

Time-of-Day Rates

The company proposes no substantive changes to its current time-of-day provisions in the Medium and Large General Service Schedules, which provisions allow for the determination of on-peak and off-peak demand and corresponding energy measurement.

The Staff examined C&SOE's load characteristics, determined that the system would lend itself to time-of-day rates, and recommends that such rates be made available to C&SOE's residential and small general service customers on an optional basis (Staff Ex. 1, p. 72).

Consumers' Counsel suggests that the structure of the time-of-use rates for Medium and Large General Service customers be refined; its witness, Mr. Johnson, testified that the costs of doing so would be negligible, while the cost savings to the system could be substantial (OCC Ex. 8, p. 81). Mr. Johnson also supports the Staff's recommendation that residential customers be given the option of

going on time-of-day rates, pointing out the benefits of which that would provide (OCC Ex. 8, p. 83). He suggests that this would generate useful information on the appropriateness of such rates and that, to the extent that such rates encourage shifts in consumption from on-peak to off-peak periods, they would reduce fuel costs and the need for additional capital consumption.

Mr. Chaney recommends the use of time-of-day pricing at this time for only those areas of sales for which there is a potential true cost savings; he sees no clear course of action with regard to time-of-day rates (App. Ex. 11, p. 45).

We don't believe that the adoption of optional time-of-day rates for residential and small commercial customers would provide the benefits which Mr. Johnson supposes. We believe it to be reasonable to assume that most of those who would choose to be on that rate are those who would benefit without any change in consumption patterns.

This Commission has, in recent cases, ordered the implementation of optional time-of-day rates in order to collect data on the effects of such rates. However, there has been insufficient evidence provided in this proceeding to show that implementation of even optional rates is reasonable at this time. We will not require that C&SOE offer such rates. Nor do we believe that a refinement of the General Service time-of-use rates is necessary.

Tariff Provisions

Consumers' Counsel addresses in its brief its recommendation that revisions be made in certain of the company's tariff provisions relating to company practices. Although requests for tariff revisions of the sort raised by Consumers' Counsel might better be raised in complaint

proceedings brought pursuant to Section 4905.26 of the Revised Code, and although we have, in other proceedings, chosen not to deal with proposals regarding the applicant's rules and regulations [*see, e.g., Ohio Edison Company*, Case No. 77-1249-EL-AIR *et al.* (Opinion and Order, November 17, 1978)], we note that there was no general objection to Consumers' Counsel's cross-examination on these issues. We will, therefore, discuss herein the particular matters raised by Consumers' Counsel. However, our discussion should not be taken as an indication that we have retreated from our position that these matters should not be considered in rate cases. We proceed only because there is already testimony on the record on these issues, and because our resolutions of these issues, which is to reject Consumers' Counsel's recommendations for the reasons set forth, will not prejudice the company.

The first provision brought into focus concerns the company's current tariff providing that copies of various rate schedules be available to consumers for their inspection at the company's business office (OCC Ex. 2, p. 1). Consumers' Counsel proposes that the company's tariff *require* the provision of tariff schedules for inspection by consumers upon request. Company witness Forrester testified that these schedules *are* presently made available upon request (IX, 39), and there was no testimony to indicate otherwise. Based upon the evidence of this record, the Commission will not order a revision of the tariff language.

The next item of concern involves a tariff provision which requires the company to "endeavor to" advise the customer of the most advantageous rate available for service (OCC Ex. 2, p. 1). Mr. Forrester explained the company's practices in this regard (IX, 41-44); those practices would seem to comport precisely with the tariff. Based upon Mr. Forrester's testimony, the Commission is not convinced that this tariff provision needs rewording. How-

ever the Commission does believe that the company should, without question, make the effort to promote customer "understandability" of its tariff offerings at every opportunity, and not just at the moment of initiation of service. Periodically, the company should "endeavor to" provide this type of information in the billing format.

The next item concerns meter testing and the customer's prerogative to witness such testing (OCC Ex. 2, p. 2; IX, 46). The tariff provides for meter tests at the discretion of the company or upon customer request, but fails to provide for notice to the customer to enable him to be in attendance. Mr. Forrester explained that upon customer request for testing, the company "will make every attempt to let them be present at the testing of the meter" and will inform the customer at the time of the request as to the probable date of the test (IX, 46, 47). Normally, the company does not attempt customer notification in the event of a company-initiated test (IX, 46). Consumers' Counsel recommends that the company's tariff require notice to a consumer of any test to be performed on his meter and which would require that information be provided to the customer as to how his presence at the test can be arranged. Consumers' Counsel would, further, have the company be required to inform the consumer, in writing, of the results of any such meter test.

Mr. Forrester explained, in detail, the "discretionary" testing of meters. It is the objective to test meters every seven to ten years. Tests are also conducted on "high-bill or low-bill inquiries" which are "generated" from computer kick outs (IX, 47). Other instances would include suspected "current diversion" or "theft of electricity" (IX, 47). All of the "high-low kick outs" are not, and probably could not be, tested, as there are some thirty to forty thousand such kick outs a month (IX, 48-49). Aside from the sheer costs that would be involved in customer noti-

fication of each test (IX, 49), the logistics involved in coordinating notification with testing, including the accurate prediction of a particular day on which a given meter would be tested, are staggering. Mr. Forrester testified that an actual test might be conducted anywhere within a time frame of many months, once the decision to test was made (IX, 51). It should also be noted that the employees who do the meter testing are not the same as those who read the meters (IX, 50). It is appropriate to recognize in this context that the accuracy of any given meter is very important. Testing, which ensures or confirms this accuracy, is also of vital importance. It is important to the company, its customers, and the particular customer whose meter is tested — especially in light of the potential of backbilling in the event that a meter is slow. The recommendation by Consumers' Counsel with particular respect to discretionary testing would, as is clear from the testimony of this record, hamper this process. The recommended tariff insertion concerning this subject matter will not be ordered.

The next item concerns "disconnections on the basis of nonpayment of a security deposit when bills for service are currently paid" (IX, 53). The security deposit is part of the bill, and nonpayment can result ultimately in disconnection (IX, 53-54). It is the position of Consumers' Counsel that when "bills for service" are currently paid, credit worthiness is established [the establishment of credit worthiness being the stated purpose of requiring a customer deposit (IX, 53)]. It occurs to this Commission that the request for a security deposit is not frivolously imposed. Other means of establishing credit worthiness are available which effectively obviate the need for a deposit (IX, 53). Recognizing the lag between receipt of and payment for electric service, such may be thought of as a kind of credit transaction. Where credit worthiness has not been demon-

strated by those other methods, there arises a legitimate concern on the part of the company; the failure to pay the security deposit would tend to add to that concern (IX, 54). Failure to pay the security deposit is failure to pay a part of the bill, and a delinquent customer has ample time to make full payment prior to actual disconnection (IX, 54). The Commission will not order the amendment requested by Consumers' Counsel with respect to the nonpayment of a security deposit (*see* OCC Ex. 2, p. 2).

The next item concerns company procedure in the event of a bill dispute, a procedure which is not detailed in company tariffs (IX, 55). Mr. Forrester explained company procedure (IX, 55-60). Consumers' Counsel recommends that the company be required to include in its rules and regulations for electric service a provision setting forth a procedure in the event of consumer complaints. Such a provision, much of which would be consistent with current company practice, would require prompt investigation and resolution of complaints, review of disputes by supervisory personnel of the company, and written notice to the consumer of his right to review by the Commission. Consumers' Counsel also recommends that the company be prohibited, by tariff, from suspending service on the basis of an unpaid bill where such is the subject of a "bona fide dispute". However, Consumers' Counsel does not define or identify a bona fide dispute. In light of Mr. Forrester's testimony outlining company procedures in this regard, the Commission is not convinced that tariff additions or modifications along these lines are needed.

The next item concerns Consumers' Counsel's request that the company's tariffs incorporate provisions which would require the company to render bills for initial and final service on the basis of company-performed meter readings or, in the alternative, to inform the customer that his initial or final bill is to be estimated and that he may

provide the results of his own reading to the company on which his bill would be based. According to testimony of record, the company does allow a customer to provide his own reading (IX, 63). There is no testimony to the effect that present company policy has given rise to any controversy or hardship. Based on the evidence of record, the Commission will not order the incorporation into the company's tariffs of the requested provisions.

The Public Utility Regulatory Policies Act (PURPA)

In November 1978, Congress enacted, and the President signed into law, the Public Utility Regulatory Policies Act (PURPA) as one of five pieces of legislation which comprised the National Energy Act. PURPA requires that each state utility regulatory agency review and consider certain electric and natural gas utility rate and regulation standards which are intended to encourage conservation of energy, efficient use of utility resources, and equitable rates and charges to customers.

The Commission must consider, for each regulated electric utility covered under PURPA, the cost of providing service to each class of customer and determine rates which are, as nearly as practicable, commensurate with those costs. The adoption of specific rates will include determining the appropriateness of declining blocks, time-of-use rates, seasonal rates, interruptible rates, load management techniques, and a review of lifeline type schedules. Additionally, consideration must be given to the restriction of master metering service, automatic adjustment clauses, information which is to be provided by the utility to its customers, service termination procedures, and a review of advertising expenses.

The specific standards to be considered under PURPA have been segregated into two procedural categories: generic and case specific. Prohibitions on master metering,

procedures for providing adequate information to consumers, procedures to protect ratepayers from abrupt termination, and lifeline rates will be generic in nature. Various proceedings have been initiated to address the propriety of these standards. The remaining standards of advertising expenses, cost of service, declining block rates, time-of-day rates, seasonal rates, interruptible rates and load management techniques, as they relate to this utility's pricing policy and rate structure, have been addressed and reviewed in this proceeding. As reflected in this Commission's Opinion and Order and the evidence of record in this proceeding, many considerations appropriate for this utility embrace the standards which we believe are intended by PURPA. The Rates and Tariffs discussion contained in this Opinion and Order reflects the extent to which the Commission has determined the appropriateness of those standards.

Effective Date

It has been the practice of the Commission to provide in its rate orders that tariffs filed pursuant to such orders shall be applicable to service rendered thirty days following the issuance of the entry accepting those tariffs for filing. The purpose of delaying the effective date of the tariffs has been to give notice of the authorized increase to the affected customers through mailings by the company prior to the time those rates go into effect. The Commission continues to believe that this is a reasonable practice, but finds that there are circumstances presented by this case which compel a departure from this policy.

Section 4909.42 of the Revised Code provides that if the Commission has not acted upon a rate application filed pursuant to Section 4909.18 of the Revised Code within 275 days of the date of filing, the applicant utility, upon the filing of an undertaking in amount determined by the

Commission, may place the proposed rates into effect, subject to the condition that amounts charged and collected in excess of those finally determined to be reasonable by the Commission shall be refunded. C&SOE has not attempted to place its proposed rates into effect by filing an undertaking, even though the 275 day time period expired on December 1, 1979. The Commission believes that basic principles of fairness dictate that the company should not be penalized for its forebearance, and that the appropriate course in this case is to establish the effective date of the tariffs filed pursuant to this order as the date they are approved by Commission entry. The customary notification requirement will, of course, be retained, the notice to be mailed to customers upon approval of its form by the Commission.

ORDINANCE RATES

C&SOE contends that the term of City of Columbus Ordinance 105-79 is unreasonable. In light of our determination with regard to the ability of a company to file for rate relief [*See* Order on Rehearing of September 5, 1979 in this Case], it is not clear that our decision on the term of the ordinance is particularly meaningful. However, we will decide the issue.

Section 4909.39 of the Revised Code provides that if the Commission determines that any provisions of the ordinance appealed from are, or will be, unjust or unreasonable, it can strike out such unjust or unreasonable portions and substitute such provisions as it considers fair and reasonable. We find, on the basis of the testimony in this proceeding as to current economic conditions, that the three year term is unreasonable, and that a two year term should be substituted.

FINDINGS OF FACT:

From the evidence of record in this proceeding, the Commission now makes the following findings:

(1) The value of all of the applicant's property used and useful for the rendition of electric service to the customers affected by this application and complaint and appeal determined in accordance with Sections 4909.05 and 4909.15 of the Revised Code as of the date certain of February 28, 1978, is not less than $1,005,581,000.

(2) The value of the rate base properly allocable to the application area is not less than $518,633,000.

(3) The value of the rate base properly allocable to the City of Columbus is not less than $486,948,000.

(4) For the twelve month period ending August 31, 1979, the test period in this proceeding, the revenues, expenses, and income available for fixed charges realized by applicant under the rate schedules now in effect were $366,350,000, $294,977,000, and $71,373,000, respectively.

(5) The revenues, expenses, and income available for fixed charges realized by applicant in the application area under present rates were $188,897,000, $152,276,000, and $36,621,000, respectively.

(6) The revenues, expenses, and income available for fixed charges realized by applicant in the City of Columbus under present rates now continued in effect by the ordinance complained of were $177,453,000, $142,701,000, and $34,752,000, respectively.

(7) The total net annual compensation of $71,373,000 represents a rate of return of 7.10 percent on the jurisdictional rate base.

(8) The net annual compensation of $36,621,000 realized by applicant in the application area represents a rate of return of 7.06 percent on the allocated rate base.

(9) The net annual compensation of $34,752,000 realized by applicant in the City of Columbus represents a rate of return of 7.14 percent on the allocated rate base.

(10) Rates of return of 7.10 percent, 7.06 percent, and 7.14 percent are insufficient to provide applicant reasonable compensation for the electric service rendered customers affected by the application and complaint and appeal.

(11) A rate of return of 10.79 percent is fair and reasonable and sufficient to provide applicant just compensation and return on the value of its property used and useful in furnishing the service described in the application and complaint and appeal.

(12) A rate of return of 10.79 percent applied to the jurisdictional rate base of $1,005,581,000 will result in income available for fixed charges in the amount of $108,502,000.

(13) The allowable annual expenses of applicant for purposes of this proceeding are $329,868,000.

(14) The allowable gross annual revenue to which applicant is entitled for purposes of this proceeding is the sum of the amounts stated in Findings 12 and 13, or $438,370,000.

(15) Applicant's present tariffs should be withdrawn and cancelled and applicant should submit new tariffs consistent in all respects with the discussion and findings set forth above.

(16) The tariffs submitted by applicant shall contain base (or non-fuel) rates and charges sufficient to yield gross revenues which will compensate the company for allowable test period operating expenses, exclusive of fuel costs includable in

its fuel adjustment clause, and yield a 10.79 percent rate of return on its rate base of $1,005,581,000.

(17) The provisions of these tariffs should be substituted for the provisions of Ordinance No. 105-79 of the City of Columbus.

CONCLUSIONS OF LAW:

(1) The application herein was filed pursuant to, and this Commission has jurisdiction thereof under, the provisions of Sections 4909.17, 4909.18 and 4909.19 of the Revised Code; applicant has complied with the requirements of those statutes.

(2) The instant complaint and appeal was filed pursuant to, and this Commission has jurisdiction thereof under, the provisions of Section 4909.34 of the Revised Code; complainant has complied with all applicable statutory requirements.

(3) A staff investigation has been conducted and a report duly filed and mailed and public hearings have been held, the written notice of which having complied with the requirements of Section 4909.19 of the Revised Code.

(4) The existing rates and charges now being charged and collected by applicant for electric service to customers affected by this application are insufficient to provide the company with adequate net annual compensation and return on its property used and useful in the rendition of electric service.

(5) The rates for electric service contained in Ordinance No. 105-79 of the City of Columbus are insufficient to provide complainant adequate net annual compensation and return on its property used and useful in furnishing the service governed by said ordinance.

(6) A rate of return of 10.79 percent is fair and reasonable under the circumstances of this case and

is sufficient to provide applicant just compensation and return on its property used and useful in the rendition of electric service to its customers.

(7) Applicant should be authorized to cancel and withdraw its presently effective tariffs on file with this Commission and to file tariffs consistent in all respects with the discussion and findings set forth above.

(8) The provisions of these tariffs should be substituted for the provisions of Ordinance No. 105-79 of the City of Columbus.

ORDER:

It is, therefore,

ORDERED, That the application of Columbus and Southern Ohio Electric Company for authority to increase its rates and charges for electric service be granted to the extent provided in this Opinion and Order. It is, further,

ORDERED, That the complaint and appeal of Columbus and Southern Ohio Electric Company, from Ordinance No. 105-79 of the City of Columbus be, and hereby is, sustained and that relief be, and hereby is, authorized to the extent provided in the discussion and findings set forth above. It is, further,

ORDERED, That applicant be, and hereby is, authorized to cancel and withdraw its present tariffs and to file new tariffs consistent with the discussion and findings set forth above. Upon receipt of three (3) complete copies of tariffs conforming to this Opinion and Order, the Commission will review and approve same by entry. It is, further,

ORDERED, That the effective date of the new tariffs shall be the date said tariffs are accepted for filing. The new rates included therein shall be applicable to all service rendered on or after the effective date. Applicant shall

immediately commence notification of its customers of the increase in rates authorized herein by insert or attachment to its billings, by special mailing, or by a combination of the above. Applicant should submit a proposed form of notice to the Commission when it files its tariffs for approval and the Commission will review same and, if proper, approve it by entry. It is, further,

ORDERED, That the company work with the Staff to implement the Staff recommendations on power plant productivity adopted by the Commission. It is, further,

ORDERED, That all objections and motions not specifically discussed within this Opinion and Order or rendered moot thereby be, and hereby are overrule and denied. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES
COMMISSION OF OHIO

/s/ C. LUTHER HECKMAN

Chairman

/s/ WILLIAM NEWCOMB

Commissioner

Commissioner

Entered in the Journal

December 12, 1979

A True Copy

/s/ DAVID M. POLK

DAVID M. POLK
Secretary

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Emergency of the Electrical Energy Supply within the State of Ohio.	)))	**Case No. 78-106-EL-UNC**

ENTRY

The Commission, coming now to consider the above-entitled matter, makes the following findings:

(1) A serious shortage of electric energy exists within the State of Ohio, as a result of rapidly diminishing stockpiles of coal. On February 9, 1978, the Governor of Ohio declared a statewide energy emergency pursuant to Section 1551.09, Revised Code.

(2) The current shortage of electric energy constitutes an emergency for purposes of Section 4909.16, Revised Code. Accordingly, the Commission may issue emergency orders to protect the public health, safety, and welfare.

(3) On January 18, 1978, the Commission issued on order in Case No. 77-1139-EL-COI approving emergency electrical procedures for each of the state's electric utilities. Specifically, each company was authorized to require certain mandatory reductions in the usage of electricity.

(4) Those plans do not specify sufficiently the actions in regard to the sale and purchase of bulk power to be taken by each utility to preserve its remaining coal supply and contribute to the maintenance of the reliability of the interconnected network. Such actions, in addition to protecting the integrity of the interconnected network, also will assure that all Ohio electric utilities will purchase all available power so that the useable number of days of coal supply within Ohio will be extended. These actions will further assure the supply of

electricity for residential needs while assisting in improving the availability of electricity for the needs of commerce and industry.

(5) Actions should be taken to prevent, to the degree possible, the deterioration of production capability of one or more of the interconnected utilities from resulting in a short term capacity deficiency, with the possible attendant effects on customers of severe unanticipated outages.

(6) Electric utilities should to the extent possible arrest the decline of remaining fuel supply of those power production plants most threatened with fuel exhaustion by:

(a) Load dispatch on company owned generation to those units with more secure supply.

(b) Purchase of energy through the interconnected network from other utilities.

(7) Each electric utility should contribute to the protection of the production capability of the network by making power available for purchase by utilities more threatened with power production fuel exhaustion provided that:

(a) The purchasing utility provides evidence satisfactory to the selling utility that its power production capability is more threatened than that of the seller and,

(b) That the purchasing utility has in effect a customer use curtailment program at least as restrictive as the seller.

(8) Each utility should report to the Commission, forthwith, by report filed in this docket, each of its actions taken pursuant to the requirements of this order.

(9) That purchases made pursuant to this Entry will qualify for inclusion in the utility's fuel cost recovery mechanism without regard to the provisions of Rule 4901:1-11-01(F), Ohio Administrative Code, requiring economic dispatch.

It is, therefore,

ORDERED, That each electric utility subject to the jurisdiction of the Commission shall act to preserve the integrity of the interconnected network as specified herein above. It is, further,

ORDERED, That a copy of this Entry be served upon all electric utilities subject to the jurisdiction of the Commission.

THE PUBLIC UTILITIES
COMMISSION OF OHIO

/s/ C. LUTHER HECKMAN
Chairman

/s/ DAVID SWEET

/s/ WILLIAM NEWCOMB
Commissioners

Entered in the Journal

Feb. 14, 1978

A True Copy

/s/ RICHARD L. SMITH

RICHARD L. SMITH
Secretary

STATE OF OHIO

EXECUTIVE DEPARTMENT

OFFICE OF THE GOVERNOR

Columbus

EXECUTIVE ORDER
DECLARING ENERGY EMERGENCY

WHEREAS, Section 1551.09, Revised Code, authorizes the Governor to declare an energy emergency after consultation with the Director of Energy when he finds "that the health, safety, or welfare of the residents of this State or of one or more counties of the State is so imminently and substantially threatened by an energy shortage that immediate action of State government is necessary to prevent loss of life, protect the public health or safety, and prevent unnecessary or avoidable damage to property", and

WHEREAS, there exists in Ohio an energy shortage which threatens jobs, education, safety, lives and welfare and involves the possible loss of energy supplies for residential dwellings, and

WHEREAS, information has been presented to me from various electrical generating utilities and other affected uses of coal that due to rapidly diminishing stockpiles of coal such utilities and other users of coal may soon be forced to impose substantial electrical curtailments which will affect the health, safety, and welfare of Ohio citizens,

NOW THEREFORE, I, JAMES A. RHODES, Governor of the State of Ohio, pursuant to the authority granted me by Section 1551.09, Revised Code, do hereby declare an energy emergency in the State of Ohio until further notice.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 9th day of February, in the year of our Lord, One-Thousand Nine Hundred and Seventy-Eight.

[SEAL]

JAMES A. RHODES
Governor

ATTEST:

Secretary of State

IN THE SUPREME COURT OF OHIO

No. 80-503

APPEAL FROM
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Case No. 78-1438-EL-AIR

COLUMBUS AND SOUTHERN OHIO
ELECTRIC COMPANY,
Appellant,
v.
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

NOTICE OF APPEAL

Now comes the appellant Columbus and Southern Ohio Electric Company, pursuant to R.C. § 4903.13, and hereby gives notice of appeal against The Public Utilities Commission of Ohio to the Supreme Court of Ohio from the Opinion and Order of said Commission issued and entered in the Journal of the Commission on December 12, 1979, in Case No. 78-1438-EL-AIR, styled In the Matter of the Application and Complaint and Appeal of Columbus and Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service. A copy of the Opinion and Order is attached hereto, marked Exhibit A and incorporated herein.

The appellant complains that the December 12, 1979 Opinion and Order is unreasonable and unlawful and should be reversed for the following reason:

1. The Commission erred by failing to authorize the Company to recover $6,056,524 in purchased power costs through an interim surcharge, in that such costs were incurred as a result of a Commission order to purchase power to protect remaining coal supplies during the United Mine Workers' coal strike in the first quarter of 1978. The Commission's refusal to allow compensation for these costs deprives the Company of its property without just compensation and without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and Article I, Sections 1, 16, and 19 of the Constitution of Ohio.

WHEREFORE, appellant Columbus and Southern Ohio Electric Company respectfully submits that the December 12, 1979 Opinion and Order of The Public Utilities Commission is unlawful and unreasonable and should be reversed, vacated and remanded to the Commission with instructions to enter an order authorizing the appellant to recover $6,056,524 in purchased power costs through an interim surcharge.

Respectfully submitted,
SAMUEL H. PORTER,
CURTIS A. LOVELAND
WILLIAM J. KELLY, JR.

By_____

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Electric Company

Section 4905.22, Ohio Revised Code

§ 4905.22 Service and facilities required; unreasonable charge prohibited. (GC §§ 614-12, 614-13)

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1766

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION OF APPELLEE PUBLIC UTILITIES COMMISSION OF OHIO, TO DISMISS APPEAL, AND IN THE ALTERNATIVE, MOTION TO AFFIRM, AND BRIEF IN SUPPORT THEREOF AND IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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(continued Inside Front Cover)

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No. 80-1766

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY

Appellant,

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MOTION OF APPELLEE PUBLIC UTILITIES COMMISSION OF OHIO, TO DISMISS APPEAL, AND IN THE ALTERNATIVE, MOTION TO AFFIRM, AND BRIEF IN SUPPORT THEREOF AND IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

MOTION TO DISMISS, AND ALTERNATIVELY, MOTION TO AFFIRM

The Appellee, the Public Utilities Commission of Ohio hereby moves that this Court dismiss the Appeal of the Columbus and Southern Ohio Electric Company as improvidently taken from the Supreme Court of Ohio under 28 U.S.C. §1257(2). Alternatively, the Public

Utilities Commission of Ohio moves that this Court affirm the decision of the Supreme Court of Ohio rendered in the case below as being correct. A brief statement of the legal arguments in support of the motion to dismiss is contained in the section which follows. Arguments in support of the motion to affirm are discussed within the main body of this brief.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

The Appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2) which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> * * *

By its express language, 28 U.S.C. § 1257(2) requires that the highest court of a state render a decision in favor of the validity of a statute before review can be sought in the Supreme Court of the United States. It is thus axiomatic that the statute in question must first be challenged at the state level. Where the State's highest court is not called upon to review a statute that is claimed to be in conflict with the United States Constitution or the treaties or laws of the United States, or where the state

court renders a decision which does not pass upon the validity of a statute, an appeal will not lie. *Kulko v. Superior Court of California*, 436 U.S. 84, 90 (1978); and see *Hanson v. Denckla*, 357 U.S. 235 (1958); *May v. Anderson*, 345 U.S. 528 (1953).

In the instant case, the Appellant, Columbus and Southern Ohio Electric Company (hereinafter "C&SOE" or "the Company"), did not challenge the validity of Ohio Revised Code Section 4905.22 (or any other statutory provision) in the proceedings before the Ohio Supreme Court. In fact, neither party even cited Ohio Revised Code Section 4905.22 in their briefs before the Ohio Supreme Court, although the Public Utilities Commission (hereinafter "the Commission") did make reference to the Company's obligation to serve its customers. C & SOE did cite Ohio Revised Code Section 4905.22 in its Motion for Rehearing before the Court, but here again the Company did not challenge or call upon the Ohio Supreme Court to decide the validity of the statute. Furthermore, C & SOE, in its Jurisdiction Statement filed on April 22, 1981, does not appear to be challenging the validity of Ohio Revised Code Section 4905.22 or any other statute before this Court. Rather, C & SOE continues to assail the decision of the Commission as it did in the proceedings below. Clearly, C & SOE's appeal pursuant to 28 U.S.C. §1257(2) is improper. *Kulko, supra; Hanson, supra; May, supra.*

The Commission recognizes that C & SOE's improper appeal does not preclude the Supreme Court from considering the Company's filings as a petition for a writ of certiorari. 28 U.S.C. §2103. Indeed, in the cases cited above just such a practice was followed. The Commission also recognizes that C & SOE's appeal, improvidently taken under 28 U.S.C. §1257(2), may be viewed as a petition for writ of certiorari under 28 U.S. C. §1257(3).

Slagle v. Ohio, 366 U.S. 259, 264 (1961). Nonetheless, the Commission urges that the Court, in exercising its judicial discretion, not grant C & SOE a writ of certiorari.

STATEMENT OF THE CASE

The Appellee Commission will confine, as much as possible, its statement of the case to where it disagrees with the summary provided by C & SOE and to facts not contained within the Company's Jurisdictional Statement. It is correct to say that there is no disagreement as to the basic facts in this case; nevertheless, there is disagreement over the import of those facts and whether C & SOE is entitled to further compensation for its purchases of power.

C & SOE correctly notes that the source of the present controversy is an order of the Commission, dated February 14, 1978, issued subsequent to the Ohio Governor's declaration of a statewide energy emergency. While it is evident that one purpose of the Commission's order was to prevent severe curtailments of power, it was also the Commission's desire to preserve the reliability of the interconnected network of facilities among electric utilities. Here, the Commission's directive reflected the concern that the failure of one utility to maintain an adequate level of electrical generation could trigger a regional blackout adversely affecting even those utilities with sufficient coal supplies. In this respect, the Commission's order provided C & SOE with an unquantified benefit.

Neither the Governor's declaration nor the Commission's order was challenged in the state courts and the wisdom of these directives is not here at issue. Indeed, in its initial brief before the Ohio Supreme Court in the proceedings below C & SOE acknowledged that the

Commission's order of February 14, 1978, was a valid exercise of a legitimate police power.

The Commission would note that on March 6, 1978, C & SOE filed a proposal to impose mandatory 50% curtailments. This filing was indicative of the emergency conditions under which C & SOE then operated. To the extent that C & SOE's purchases of power enabled it to avoid having to impose mandatory curtailments on its customers, C & SOE benefited by having the ability to make sales and receive revenues. While C & SOE was, perhaps, not able to recover all the costs of purchased power, it did recover for those fixed costs reflected in its non-fuel rates — a recovery which would have been lost during periods of severe curtailment or blackout. Thus, while C & SOE cites the Commissions's directive as the basis for its argument that its property was "taken", there exists the real possibility that because of the Commission's directive a net benefit accrued to C & SOE.

C & SOE does not provide the Court with any indication whether or not it would have purchased power absent the Commission's directive to do so. Implicit in C & SOE's Jurisdictional Statement is the disturbing suggestion that given a choice between purchasing power and curtailing its customers C & SOE would have chosen curtailments. To suggest otherwise would mean that C & SOE would have purchased power on its own volition, and if that was the case, C & SOE can not justifiably argue that it was the Commission's order which deprived it of its property without due process.

C & SOE has stated that its request for compensation was denied in the Commission's opinion and order of December 12, 1979. As the Court will note in reviewing that lengthy opinion and order (C & SOE's App., pp. A10-A91), the subject request was only one element in a rate increase proceeding wherein the Commission

granted C & SOE an increase in permanent rates in the amount of $72 million, annually. That same opinion and order also confirmed the Commission's earlier grant to C & SOE of over $30 million in emergency rate relief for the year of 1979.* See C & SOE App., pp. 68, 69.

Since the Commission's decisions in both the emergency and permanent rate proceedings reflected an attempt to improve C & SOE's financial status and its position in the capital markets, there further exists the possibility that C & SOE has been indirectly compensated for its purchased power costs. However, no analysis has ever been done to measure the net benefit or detriment to C & SOE of the impact of the Commission's orders. For its part, C & SOE simply put in evidence in the permanent rate proceeding its request for a $6 million surcharge to the Commission; a request which the Staff of the Commission opposed as being inimical to the concept of setting future rates.

The Commission does not contest C & SOE's contentions that it and other utilities were struggling to maintain service during the coal strike emergency period. The utilities, however, were not alone in their efforts as the citizens of Ohio undertook significant conservation measures voluntarily and at the urging of state officials. And of course, the consumers of electricity from C & SOE paid an additional $13 million to the Company as a result of the power purchased pursuant to the Commission's order.

As a final point, the Commission would note its belief

* In its Opinion and Order of February 28, 1979, the Commission authorized C & SOE to collect $32,800,000 in additional revenues for the remainder of 1979 subject to certain refund provisions. On January 7, 1981, the Commission issued an opinion and order requiring a refund of $1,378,000.

that the amount in controversy has been altered by the merger of C & SOE into the American Electric Power Company as of May, 1980. See Jurisdictional Statement, fn 1. Because of its geographical location, it is highly probable that C & SOE purchased a portion of its power from or through other subsidiaries of the American Electric Power Company. To the extent that any portion of the $6 million in non-fuel charges accrued to those subsidiaries, which are now C & SOE's affiliates, C & SOE's claim for relief should be reduced.

QUESTION PRESENTED

Does the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States, as applied to the states under the Fourteenth Amendment, require that an electric utility recover the costs of energy purchased pursuant to an order of a state public utility commission acting under a valid exercise of the state's police power in order to avoid severe curtailments and maintain the interconnected network of facilities among electric utilities.

ARGUMENT

The Commission has previously expressed its contention the C&SOE has improperly sought the avenue of an appeal to raise its issue before the Court. In the Commission's view, the appeal should be regarded as a petition for certiorari and the Court's discretion should be exercised accordingly. In that light, the Commission believes that the present matter is not suitable for judicial review. It has been stated that certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers and Co.*, 240 U.S. 251, 257-258 (1916).

The Commission believes that the present case is not "ripe" for this Court's review. As discussed previously, there exists several ways by which C & SOE has, in effect, recovered the dollars which it claims are at issue here. Principal among those is that, as noted by the Ohio Supreme Court in its decision, C & SOE received an unquantified benefit by virtue of the Commission's order.

C & SOE has attempted to magnify the impact of the decisions of the Commission and the Ohio Supreme Court into pronouncements of national importance. But in fact, those decisions dealt with a situation peculiar to Ohio at a particular point in time. Even C & SOE's ominous assertion that "public utility energy shortages will be an American way of life for the forseeable future" is not appropriate to its own situation. C & SOE has noted that over 90% of its generating capacity is coal fired, and the Commission believes that the Court can take judicial notice of the fact that C & SOE and its affiliates are located in a region of abundant coal reserves.

The Commission expects that the position of C & SOE will be echoed in the briefs *amicus curiae* which will be filed concurrent with this brief. Perhaps such briefs will refer to the current coal strike as a reason why the question raised is of national importance. Although this Commission concedes that Ohio may yet face an emergency similar to that which existed in 1978, it does not believe that the effects on Ohio's utilities will be the same. This is because the Federal Energy Regulatory Commission has moved to eliminate the high percentage "adders" previously charged on emergency energy transactions between electric utilities. It was these "adders" that in large part gave rise to the $6 million non-fuel costs claimed by C & SOE.

Though there are several reasons why the Court should

not exercise its discretion to hear this case, the Commission believes that if a writ of certiorari was granted the decision of the Ohio Supreme Court would be affirmed. The action of the Commission is simply not a taking without just compensation prohibited by the Fifth and Fourteenth Amendment to the United States Constitution.

The question of what constitutes a "taking" and what is "just compensation" under the Fifth and Fourteenth Amendments has proved to be a problem of considerable difficulty. It is certainly not the cut and dried analysis suggested by C & SOE in its Jurisdictional Statement. Indeed, no less an authority than this Court has stated that "no rigid rules" or "set formula" are available to determine where valid regulation ends and taking begins. *United States v. Coltex. Inc.*, 344 U.S. 149, 156 (1952); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). And the Court itself referred to its review of cases claiming a "taking" under the Fifth Amendment as "essentially ad hoc, factual inquiries." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The Supreme Court has, however, noted several factors of significance. Among these factors are the economic regulation of the property holder and the extent to which regulation has interfered with investment-backed expectation. *Goldblatt v. Hempstead, supra* at 594. And the Court has more readily found a "taking" in those cases where there is a physical invasion of property than in those cases where there is an adjustment of economic benefits. *Penn Central Transp. Co. v. New York City, supra* at 124. Indeed, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

In its argument, C & SOE contends that its private

property was taken for public use without compensation. This Court has reviewed similar contentions and has found laws which in effect transfer economic benefits from one party to others valid. *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). In a number of these cases, the Court has had to consider questions of eminent domain and the "taking" of land and land rights by zoning. While the Court's holdings here have rested upon various factual differences, it is noteworthy that the Court has not found a "taking" even where there is an extreme diminution in property values because of the challenged law. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), (75% diminution); *Hadacheck v. Sebastian, supra* (87.5% diminution).

In a line of cases more parallel to the instant appeal, the Court has upheld regulations requiring railroads to separate grade crossings and bear the costs incident thereto. *Atchison, T. & S.F. Ry. v. Pub. Util. Comm.*, 346 U.S. 346 (1953); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935); *Erie R.R. v. Pub. Util. Comm.*, 254 U.S. 394 (1929). In *New Orleans Public Service v. City of New Orleans*, 281 U.S. 682 (1930), the Court stated at p. 687, citing *Chicago, B. & Q.R. Co. v. Chicago, supra:*

> It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law.

In *New Orleans Public Service v. City of New Orleans*, the city required the removal of a viaduct and the installation of crossings. Reviewing the contention that the cost of removal constituted a taking, the Court stated:

> . . . the evidence fails to show that, having regard to the circumstances, it is so large that

> the regulation must be held to pass the limits of reasonable judgment and amount to an infringement of the right of ownership.

New Orleans Public Service, supra, represents the Court's more narrow view of the "taking" question. The broad view was expressed in *Erie R.R., supra,* where when confronted with the argument that a regulation might bankrupt the Erie, Justice Holmes stated:

> . . . that the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. 254 U.S. at 410.

It is thus obvious that the question of "compensation" is intricately tied to the "taking" issue. In one instance, upon considering the "compensation" issue in terms of government price controls, the Court found that the regulated ceiling price constituted just compensation even though it was below the company's cost. *United States v. Commodities Trading Corp.,* 339 U.S. 121 (1950). Finally, it appears that the Court has taken a broad view as to what constitutes "just compensation". See *Penn Central Trnsp. Co. v. New York City, supra.* Compare majority and dissenting opinions.

C & SOE has placed particular emphasis on *City of Pittsburgh v. Pennsylvania Public Utility Commission,* 42 Pa. Commw. Ct. 242, 40 A.2d 672, 20 P.U.R. 4th 373 (1979), which deserves some discussion. In *City of Pittsburgh, supra,* an intermediate level appellate court affirmed an Order of the Pennsylvania Public Utility Commission entered March 2, 1978, which granted the request of the Duquesne Light Company for an emergency surcharge. Duquesne, in filing for the surcharge on February 6, 1978, claimed it was needed to enable the utility

to maintain proper service to the public. At hearings, Duquesne produced evidence demonstrating specific repercussions of the coal strike and the resultant need for emergency relief. From the Court's decision, it can be seen that the relief sought and granted was not designed to recover or reimburse Duquesne for the actual costs of purchased power. Rather, the emergency relief was intended to alleviate the specific critical financial condition faced by Duquesne at that time.

It appears the relief granted to Duquesne was akin to the emergency relief previously granted C & SOE. Thus, the Commission believes that the actions of the Pennsylvania Commission, as affirmed in *City of Pittsburgh*, *supra*, rather than supporting C & SOE's arguments, support the Commission's contention that the Appellant was in some part compensated for its emergency power purchases through the Commission's granting of over $30 million in emergency rate relief.

CONCLUSION

Applying the holdings discussed above to the issues in the present case, it can be seen that the Commission's action in directing C & SOE to purchase emergency energy did not constitue a "taking" as that has been defined by the United States Supreme Court. Likewise, even if the Commission were deemed to have subjected C & SOE to a "taking" contrary to due process of law, C & SOE has recovered just compensation either through its continued abliity to make sales during the energy emergency, or through the emergency rate relief granted, or simply by its ability to recover two-thirds of its total purchased power costs through its fuel adjustment clause mechanism.

In summary, it is clear that the Commission's decision not to grant C & SOE a surcharge to recover $6 million was not in violation of the Fifth and Fourteenth Amendments to the United States Constitution. C & SOE's appeal, which must be regarded a petition for writ of certiorari, should be denied, or alternatively the Commission should be affirmed.

Respectfully submitted,

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Dated May 22, 1981

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion of Appellee Public Utilities Commission of Ohio to Dismiss Appeal, and in the Alternative, Motion to Affirm, and Brief in Support Therof and in Opposition to the Granting of a Writ of Certiorari to the Supreme Court of Ohio were sent by United States first class mail, postage prepaid, to counsel representing parties of record and *amicus curiae* in this proceeding this 22nd day of May, 1981.

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I further certify that all parties required to be served have been served.

/s/ Harris S. Leven
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ALEXANDER L. STE
CLERK

No. 80-1766

IN THE

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October Term, 1980

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ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLANT, COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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June 1, 1981

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No. 80-1766

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLANT, COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant, Columbus and Southern Ohio Electric Company (hereinafter "the Company"), submits that the arguments advanced by Appellee in its Motion to Dismiss or Affirm are unsupported by the law or by the record below. The Court should overrule Appellee's motion and note probable jurisdiction in this case.

I.

Appellee, The Public Utilities Commission of Ohio (hereinafter "the Commission"), is plainly incorrect in asserting in its motion that an appeal does not lie under 28 U.S.C. § 1257(2) from the judgment of the Ohio Supreme Court in this case. The reference to a "statute of any state" in Section 1257(2) encompasses not only the laws passed by a state legislature, but also the orders of state commissions issued in the exercise of delegated legislative authority. Orders of state public utilities commissions are therefore within this definition of "statute." *See, e.g., Atchison, Topeka & S. F. R. Co. v. Pub. Util. Comm.*, 346 U.S. 346, 348-49 (1953); *Lake Erie & Western R. Co. v. State Pub. Util. Comm.*, 249 U.S. 422 (1919). This principle was recently recognized in *Consolidated Edison Co. v. Pub. Serv. Comm.*, 444 U.S. 822 (1979), where the Court noted probable jurisdiction over an *appeal* from a judgment of the New York Court of Appeals affirming an order of the New York Public Service Commission, and ultimately reversed the judgment. 447 U.S. 537 (1980). The Commission's claim that this Court lacks jurisdiction over this appeal must therefore be rejected.

II.

The Commission has made a number of factual assertions in its Statement of the Case which are apparently intended to convince the Court that the refusal to allow compensation for the costs of purchased power did not amount to an unconstitutional taking, or, in the alternative, that the Company had, in some unexplained way, already been compensated for the costs of these mandated purchases. All of these assertions share a common flaw, in that they are *post hoc* rationalizations of counsel, none of which were relied upon as a basis of the decision below, and none of which have any foundation in the record.

The first such assertion is that the Company received "an unquantified benefit" because the Commission's order was intended "to preserve the reliability of the interconnected network of facilities among electric utilities." Motion, p. 4. This purported benefit exists only in the imagination of the Commission's counsel. Although electric utility systems in Ohio are interconnected, each utility's system normally operates as a separate, self-sufficient unit, without interchanges of power with other utilities. That one utility may be unable to serve demands on its own system does not therefore affect the ability of surrounding utilities to serve their customers, and would certainly not lead to a "regional blackout" as claimed by the Commission.[1] Even if a regional blackout was indeed a possibility, which in fact it was not, the Commission fails to explain how the prevention of service interruptions conferred a benefit on the Company and its shareholders, as opposed to its customers and those of interconnected utilities. The fact remains that the net effect of the Commission's action was to impose an uncompensated $6 million expense on the Company and its shareholders, while customers benefited from undiminished service.

The next rationalization offered by the Commission is that there is a "possibility" that the Company incurred a benefit as a result of the Commission's orders because it was able to make sales of electricity which would not have been possible if the Commission had imposed mandatory curtailments. Motion, p. 5. The Commission ignores the fact

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[1] In the majority of situations, there is a combination of automatic and manual actions which can be taken by a utility to prevent a blackout from extending to the utility's entire system. U.S. Dept. of Energy, *The National Electric Reliability Study: Final Report*, 39-40 (April 1981) (DOE/EP-0004). The same types of actions (transmission line relaying, load shedding) are relied upon to prevent the blackout from extending to adjoining utility systems.

that the revenues from those sales were insufficient to recover the extraordinary costs incurred as a result of the Commission's orders. The ability to make sales is no "benefit" if those sales are made below their actual costs. Accordingly, the Company would have been better off had the Commission imposed mandatory curtailments, because the Company would not have been required to purchase power and to resell that power to customers at rates below cost.

The next *post hoc* rationalization offered by the Commission is its assertion that the Company was compensated for this $6 million expense in either its permanent rate case (Case No. 78-1438-EL-AIR), or in a related emergency rate case (Case No. 78-1439-EL-AEM). These assertions are plainly untrue. The Commission's order in the permanent rate case specifically rejected the Company's request for compensation for the mandated power purchases, App. A55, and it is incredible that it should now argue that it in fact granted this request in some mysterious way. With respect to the emergency rate order, the Commission neglects to inform the Court that the Company made no request for compensation in that case, and that the emergency relief was granted to avert a financial crisis which occurred nearly a year after the power purchases in question. Indeed, the Commission offers no explanation of how these orders purportedly provided compensation to the Company, conceding that "no analysis has ever been done to measure the net benefit or detriment" to the Company. Motion, p. 6. In any event, however, it is a little too late in the game for the Commission to contend that the amount of the purchased power expense that remains uncompensated is somehow less than the $6 million claimed by the Company, since the Ohio Supreme Court specifically found that compensation was denied, and that the amount of the unrecovered expense "is not

at issue in this proceeding," 64 Ohio St. 2d at 175-176, 413 N.E.2d at 1209, App. A3-A4.

Finally, the Commission offers the incredible suggestion that because of the "merger" of the Company with American Electric Power Company (AEP) two years after the purchases of power in question, the constitutional requirement of just and full compensation should be ignored because some of the compelled purchases of power may have come from subsidiaries of AEP. Motion, p. 7. This assertion is not only factually incorrect, it is premised upon fallacious logic. The factual error is that C&SOE was not "merge[d] into the American Electric Power Company" as claimed by the Commission. Rather, AEP acquired a majority of the common stock of the Company, and the Company maintained a corporate identity, as a wholly-owned subsidiary, separate and distinct from that of AEP or any other AEP subsidiary. The logical error is the assumption that this acquisition has any impact upon the Company's right to compensation. The fact that some of the purchased power costs incurred by the Company were paid to other utilities which happened to be AEP subsidiaries does not alter the fact that these costs were actually incurred and paid by the Company, and were never recovered.

III.

The Argument portion of the Commission's Motion continues and expands upon the fallacious reasoning advanced in its Statement of the Case, arguing that this case is not "ripe" [sic] for review because the Company has allegedly already recovered the $6 million at issue in this case.[2] As has already been stated, the claim that the Com-

[2] Apparently, the Commission has confused the doctrine of "ripeness" for the doctrine of "mootness."

pany has somehow received compensation for this taking simply contradicts the record and findings below, and is merely an invention of counsel.

The Commission next attempts to convince the Court that this case does not present an important issue which merits review because it involves only a "situation peculiar to Ohio at a particular point in time." Motion, p. 8. The Commission's claim that the impact of the Ohio Supreme Court's judgment can be so confined is belied by the concerns of the *amici curiae* who have filed briefs in this case, as well as by the threat of another electrical supply emergency as a result of the current UMWA strike.[3]

When the Commission finally gets around to a legal argument to rebut the Company's claim of an unconstitutional taking, the only precedent which it is able to muster concerns the constitutionality of land use regulation and of the compelled construction of railroad grade crossings. These cases are legally and factually inapposite to this

---

[3] Because of the protracted nature of the current strike, Ohio utility coal supplies have been depleted to the point that on May 27, 1981, the Commission required the initiation of emergency electrical procedures prescribed in its regulations and in the tariffs of Ohio's electric utilities. The Commission's order is reproduced as an appendix to this brief.

If coal supplies continue to be depleted, Ohio electric utilities face the prospect of Commission orders requiring purchases of power to preserve coal supplies. While the Federal Energy Regulatory Commission (FERC) has placed some limitations on the amount of percentage "adders" that can be charged by a utility which transmits or "wheels" purchased power, *see* 45 Fed. Reg. 31294 (May 13, 1980), it has not placed limitations on percentage "adders" imposed by the utility which actually generates the power. Even with these minimal limitations, if Ohio utilities are required to purchase power to meet this new emergency, they will incur substantial non-fuel related charges for which they will be unable to recover compensation under the decisions below.

case, and are therefore unpersuasive. Zoning regulations such as those involved in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting operation of a brick manufacturing plant in a residential area), and in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (prohibiting industrial uses in residential areas), do not destroy an owner's right to use his property; they simply impose limitations on noxious or incompatible uses of property. The Commission's action in this case imposed no such limitation, but was an outright confiscation of the Company's property. The railroad grade crossing cases cited by the Commission are likewise inapposite, since this Court found that the requirement to construct grade crossings was not an unconstitutional taking because the initial license granted to the railroad to use public rights-of-way carried with it the obligation to do so in a manner which would preserve the public safety and convenience. *See, e.g., Atchison, Topeka & S. F. Ry. Co. v. Pub. Util. Comm.*, 346 U.S. 346, 353 (1953) There was no analogous undertaking by the Company in this case.

The Commission's concluding argument involves a misleading attempt to distinguish *City of Pittsburgh v. Pennsylvania Pub. Util. Comm.*, 42 Pa. Commw. Ct. 242, 40 A.2d 672 (1979). Contrary to the Commission's assertion, the Pennsylvania Commission's decision on review in that case did in fact grant relief in an amount calculated to reimburse the utility for the actual costs of power purchased during the coal strike under order of the Pennsylvania Commission. *See also, Pennsylvania Pub. Util. Comm. v. West Penn Power Co.*, 33 PUR 4th 543 (Pa. P.S.C. 1980). As has already been noted, the emergency rate relief which the Ohio Commission granted to the Company, Motion, p. 12, was not intended to, and did not in fact, compensate the Company for the mandatory purchases of emergency power during the coal strike.

CONCLUSION

The Motion to Dismiss or Affirm should be overruled, and probable jurisdiction should be noted in this case.

Respectfully submitted,

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APPENDIX

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Implementation of the Emergency Procedures of electric utilities subject to Commission jurisdiction to be followed in the event of a shortage in the supply of electrical energy.	Case No. 81-619-EL-COI (May 27, 1981)

ENTRY

The Commission, coming now to consider the above-entitled matter, finds:

(1) That each electric utility has emergency procedures to be followed in the event of an electrical energy shortage.

(2) That each of these plans contemplate husbanding declining fuel supplies at individual plants when necessary to protect the integrity of the power system then and in the future in the face of continuing decline of fuel availability.

(3) That procedures which preserve remaining coal supplies are reasonable and necessary when appropriate to protect the public health and safety by protecting the continued integrity of the interconnected electric system.

(4) That these actions would conflict with the requirements of Rule 4901:1-11-02 (B) of the Ohio Administrative Code (OAC) which requires the operation of the respective systems on an economic dispatch basis. Economic dispatch fails to assure fuel conservation at individual plants.

(5) That the Commission should suspend Rule 4901:1-11-02 (B), OAC for the limited period during which individual plants have less than 40 days supply remaining. The suspension should apply

only on a plant by plant basis and only in those circumstances where deviation from economic dispatch protects available fuel supply.

(6) That each electric utility shall file a report with the Commission of any deviations from economic dispatch pursuant to finding (5) above both at the initiation of such deviation and as a part of its monthly fuel reports. The reports shall specify the nature and justification for each departure from economic dispatch.

It is, therefore,

ORDERED, That rule 4901:1-11-02 (B), OAC is suspended to the limited extent described above. It is further,

ORDERED, That the reports described in finding (6) be filed. It is, further,

ORDERED, That copies of this entry be served on each party of record. It is, further,

ORDERED, That nothing herein contained shall be deemed to be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule or regulation.

THE PUBLIC UTILITIES
COMMISSION OF OHIO

/s/ WILLIAM S. NEWCOMB
Chairman

/s/ DENNIS S. PINES

/s/ MICHAEL DEL BANE
Commissioners

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INTEREST OF AMICI[1]

The Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, The Dayton Power and Light Company, Ohio Edison Company, Ohio Power Company, and Toledo Edison Company are all investor-owned

[1] Written consents of the parties to the filing of this brief have been filed with the Clerk pursuant to the requirements of Rule 36.1.

public utilities which provide electric service to customers in the State of Ohio, and which are regulated by the Appellee Public Utilities Commission of Ohio (hereinafter "the Commission"). In addition to electric service, Cincinnati Gas & Electric, Dayton Power and Light, and Toledo Edison also supply natural gas to Ohio customers. Amici appear in this case to urge the Court to note probable jurisdiction, and to overturn the judgment of the Supreme Court of Ohio which is on appeal herein.

Like the Appellant, Columbus and Southern Ohio Electric Company (hereinafter "C&SOE" or "Columbus and Southern"), these amici generate the electricity which they supply to their customers primarily by large coal-fired boilers[2], and are therefore highly dependent upon reliable and continuous supplies of coal. The 1977-78 coal strike interrupted these supplies, and consequently created a critical electric supply emergency in Ohio during the most severe winter in one hundred years.

In response to this emergency, the Commission entered an order on February 14, 1978, which applied to all electric utilities in Ohio. App. A92. Under that order, utilities were directed to "arrest the decline of remaining fuel supply" by

> (a) Load dispatch on company owned generation to those units with more secure supply;
>
> (b) Purchase of energy through the interconnected network from other utilities.
>
> App. A93

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[2] As of January 1, 1978, amici owned a total generating capacity of 25,640,762 kilowatts. Approximately 70% of this total capacity was coal-fired. Amici Cleveland Electric Illuminating and Toledo Edison are also the joint owners of a 906,000 kilowatt nuclear facility, Davis-Besse Unit 1, which was in partial service during the coal strike.

Unlike Appellant, however, Cincinnati Gas & Electric, Cleveland Electric Illuminating, and Dayton Power and Light continued to receive coal at some of their plants, and were able to meet the Commission's directive by load dispatch to these plants, therefore minimizing the need to make large purchases of power through the interconnected system.[3] Cleveland Electric Illuminating and Toledo Edison were also able to avoid large purchases of power by dispatching load to their Davis-Besse nuclear plant. Ohio Power, a subsidiary of American Electric Power Company (AEP), avoided substantial purchased power expenses by energy transfers from other AEP subsidiaries. Ohio Edison however, was not so fortunate. Like Columbus and Southern, Edison's plants are located in areas were there was extensive UMWA activity during the strike, and coal shipments to these plants were virtually shut off. As a consequence, Ohio Edison was compelled to purchase large amounts of expensive emergency energy through the interconnected network.[4]

Under the rule announced in this case, amici face the real possibility that the Commission can compel the taking of shareholder funds to pay for extraordinary measures to preserve undiminished service during future emergencies, without just compensation. Consequently, amici, who

---

[3] Cincinnati Gas & Electric, Cleveland Electric Illuminating, and Dayton Power and Light own plants which were outside the area of the most severe UMWA activity, and were therefore able to receive sporadic coal shipments at these plants.

[4] The Commission denied Ohio Edison's request to recover purchased power costs which had not been recovered through its fuel adjustment clause. *In the Matter of the Emergency of the Electrical Energy Supply Within the State of Ohio.* Case No. 78-106-EL-UNC (Entry, March 17, 1978). Thereafter, Ohio Edison again sought recovery of these costs in a general rate case, and the Commission again denied the request. *Re Ohio Edison Co.*, Case No. 77-1249-EL-AIR (Opinion and Order, November 17, 1978).

were affected in some way by the Commission's orders entered during the coal strike and because of the prospective impact of the Ohio Supreme Court's decision, have a vital interest in this Court's disposition of this appeal.

SUMMARY OF ARGUMENT

Given this country's recent history of energy supply emergencies, amici submit that it is likely that they and other utilities will face similar supply emergencies in the future. Under the rule announced by the Ohio Supreme Court in this case, amici are faced with the prospect of being ordered by the Public Utilities Commission of Ohio to take extraordinarily expensive measures to preserve undiminished service in such future emergencies, without any right to compensation therefor. The orders of the Commission, affirmed by the judgment on review in this case, accomplished the complete destruction of a valuable property right of a public utility in order to confer on the public the benefit of undiminished service during an emergency. In affirming the Commission's denial of just compensation for this taking of utility property, the judgment of the Ohio Supreme Court is contrary to the Fifth Amendment, and must therefore be reversed.

ARGUMENT

The rule of constitutional law announced by the Ohio Supreme Court in this case has implications which go far beyond the impact of an unique historical event on a single electric utility. For if the Constitution is held to permit a governmental authority to compel a public utility to expend large amounts of shareholder funds in undertaking extraordinary measures to preserve undiminished service during an energy emergency, without full compensation therefor, these amici and other utilities face the prospect

of catastrophic financial losses in the event of future energy supply emergencies.

The prospect of such emergencies occurring in the future is not imaginary, if recent history is a reliable indicator of future events. For example, east coast electric utilities faced an electrical supply emergency during 1973, when the Arab oil embargo sharply restricted fuel supplies to their oil-fired generating facilities. Gas utilities experienced repeated supply emergencies throughout the 1970s, due to shortages of natural gas. The 1978 UMWA coal strike severly impaired the generating capacity of a large number of eastern and midwest utilities, and the current UMWA strike, which, at the time of writing has lasted nearly two months, threatens to create similar problems if it endures much longer.

In the event that similar energy supply emergencies occur in the future, according to the Ohio Supreme Court, the Public Utilities Commission of Ohio may order any electric utility to purchase unlimited amounts of expensive emergency power in order to preserve undiminished service to customers, and can deny the utility the right to be fully and fairly compensated for the expense. This rule cannot withstand constitutional scrutiny, and must be reversed.

The Constitution does not invalidate police power regulation which incidentally reduces the value of a utility's property, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944), but regulation can nonetheless become so onerous as to constitute a taking of property for which the Constitution requires full compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). While it is often difficult to determine whether this constitutional line of demarcation has been crossed in a particular case, *see, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), it is clear that the Ohio Supreme

Court has strayed across that line here. There is no question that the Commission's orders in this case affected a valuable property right of C&SOE, nor that the Commission's action amounted to a complete deprivation of that right. In this respect, the Commission's action was the legal and practical equivalent of the appropriation of a $6 million asset of the utility.

There is also no question that C&SOE was denied full and fair compensation for this compelled taking of its property. Although the Ohio Supreme Court's opinion appears to assume that C&SOE's rates are adequate to compensate it for the extraordinary emergency service obligation which the Court found to be imposed by Ohio Revised Code Section 4905.22, this is plainly not the case. Columbus and Southern's general rates, as are those of any public utility, are fixed by the Commission at a level which is expected to be sufficient to meet the utility's expenses of operation during a "typical" period. Those general rates are *not* designed to adequately compensate a utility which is compelled to incur extraordinary expenses during emergency conditions. *See City of Pittsburgh v. Pennsylvania Pub. Util. Comm.*, 42 Pa. Commw. Ct. 242, 400 A.2d 672, 674 (1979). Therefore, there is no basis for any claim that C&SOE has been somehow fully compensated for this extraordinary expenditure.

Finally, there is no question that the purpose and effect of the Commission's compelled taking of C&SOE's property was to confer a benefit on the general public in C&SOE's service area. In essence, the Commission decided to place an extraordinary burden on the utility's shareholders rather than to permit the utility's customers to suffer the consequences of the strike-induced energy emergency. It is precisely such attempts to obtain public benefits at the expense of private property interests for

which the Fifth Amendment requires just compensation. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

As Mr. Justice Holmes observed in *Pennsylvania Coal*, "the question at bottom" in this case "is upon whom the loss . . . should fall." 260 U.S. at 416. Amici submit that the Supreme Court of Ohio has unconstitutionally allocated the burden of compelled emergency power purchases to utility shareholders, when that burden should have fallen on the consumers who benefited from the Commission's order. Unless the judgment of the Ohio Supreme Court is reversed, these amici and their shareholders face the real threat of similar unconstitutional deprivation in future energy supply emergencies. Accordingly, we urge the Court to note probable jurisdiction in this case, and to overturn the judgment of the Supreme Court of Ohio.

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May a state deny compensation to a utility that furnishes service in an energy emergency, as required by state law?

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No. 80-1766

In The

Supreme Court of the United States

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

PARTIES BELOW

Columbus and Southern Ohio Electric Company ("Columbus and Southern") and the Public Utilities Commission of Ohio ("the Ohio Commission" or "the Commission") were the only parties in the Supreme Court of Ohio. The other parties participating in the proceedings before the Commission are listed on page A11 of the Jurisdictional Statement.

OPINIONS BELOW

The *per curiam* decision of the Supreme Court of Ohio is reported at 64 Ohio St. 2d 175, 18 Ohio Ops. 3d 389, 413 N.E.2d 1208 (1980). The decision of the Ohio Commission is unreported, but is reproduced in full in the Jurisdictional Statement.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are reproduced in the Jurisdictional Statement.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") is the national association of investor-owned electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned utility industry and supply 77.1 percent of the nation's electricity. EEI's member companies are regulated by various state public utility commissions and hold franchises requiring them to furnish electric service to customers at approved rates. The state laws governing the provision of electric service and payment therefor are in important respects similar to the law of Ohio here in issue. Most states have energy emergency laws.[1] Others may have similar powers under general disaster legislation.[2] Under Ohio law as announced in this case, electrical utilities are expected to furnish uninterrupted service even in a declared energy emergency.

This case arose as a result of events occurring during the 1977-78 coal strike, which was the most protracted strike in the coal industry's long and troubled history. It was not, however, the last such strike; a similar one is in progress as this Brief is written.

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[1] *See* 1 Energy Mgt. (CCH) ¶9451, at 9198 (1977). *See also* Emergency Energy Conservation Act of 1979, §212, 42 U.S.C. §8512 (Supp. III 1979); Public Utility Regulatory Policies Act of 1978, §206(a), 16 U.S.C. §824a(g) (Supp. III 1979).

[2] Comptroller General of the United States, Improved Energy Contingency Planning is Needed to Manage Future Energy Shortages More Effectively 18 (Oct. 10, 1978) (EMD-78-106).

Coal strikes such as that which gave rise to this case affect many of EEI's members, which rely on coal as the principal fuel source for steam electric generation. In 1980, over 41 percent of the nation's electric generating capacity was coal-fired, producing over half the electricity used in this country. The continued availability of that capacity depends upon secure coal supplies, and access to reliable supplies of coal is dependent upon labor peace in the coal fields. While a growing number of EEI members own coal mines in whole or in part,[3] these companies have essentially no control over whether such peace will exist. The duration of labor unrest such as the 1977-78 coal strike is not predictable,[4] and cannot be taken into account in the development of utility rates.

Utility companies are exposed to extreme uncertainties in other respects as well. Two noted by the Department of Energy's "winter energy emergency plan" are a new oil embargo and severely cold temperatures.[5] Much of the fuel oil used for electric generation is imported. The last several years demonstrate all too clearly the extent to which domestic interests are at the mercy of unpredictable foreign events. Oil supplies may well be threatened as a result of the conduct of this nation's foreign policy or for reasons that bear no relation to American actions or policies.

Severe inclement weather, even in areas known for hard winters, may also give rise to extraordinary utility expenditures in the interest of maintaining or restoring service to customers.

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[3] Comptroller General of the United States, Low Productivity in American Coal Mining: Causes and Cures 93 (Mar. 3, 1981) (EMD-81-17).

[4] The 1977-78 strike occurred upon expiration of the United Mine Workers of America contract. Although the risk of a strike of some sort was known, its duration was literally unprecedented. Moreover, utilities' efforts to stockpile coal in anticipation of the strike were hampered by a proliferation of wildcat strikes. "Over 98 percent of all strikes between 1969 and 1976 have been wildcat strikes". *Id.* at 20.

[5] 1 Energy Mgt. (CCH) ¶9451, at 9195 (1977). It has also been suggested that sabotage, terrorism or enemy attack could lead to energy emergencies. Comptroller General of the United States, Federal Electrical Emergency Preparedness is Inadequate (May 12, 1981) (EMD-81-50).

See, e.g., Narragansett Elec. Co. v. Burke, 415 A.2d 177, 37 P.U.R. 4th 519 (R.I. 1980). Obviously, such events—like coal strikes or foreign political upheavals—are not controlled by a utility. More significantly, they cannot be calculated into the utility's usual rates or fully covered by fuel adjustment clauses. Such clauses typically make no provision for the recovery of non-fuel charges associated with the purchase of power from another supplier. These sums, representing demand charges and the non-fuel portion of the energy component of the power thus purchased, are at stake in this case.

If, as held below, a utility can be denied compensation for the extraordinary expenses it incurs to mitigate a severe disruption of its fuel supplies—or for other emergency reasons—in order to serve its customers, and if neither the ratemaking process nor fuel adjustment clauses allow for the recovery of such extraordinary expenses, the utility will have been made an uncompensated guarantor for matters wholly beyond its control.[6] The issue, therefore, potentially affects virtually every electric utility in the country. A matter of such gravity should be resolved on a firmer basis than the two page *per curiam* decision here on review.

STATEMENT OF THE CASE

The 1977-78 coal strike had adverse effects on many utilities in addition to Columbus and Southern. Thus, according to testimony presented before a committee of the House of Representatives as the strike was in progress, the strike affected at least 28 utilities in Pennsylvania, Maryland, West Virginia, Ohio, Indiana, Kentucky, Michigan, Illinois, Tennessee, Alabama and Mississippi.[7] Emergencies were declared in Ohio

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[6] *Cf. Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973)(noting Congressional determination not to impose common carrier obligations on electric utilities); *Richmond Power & Light v. Federal Energy Regulatory Comm'n,* 574 F.2d 610, 623 & n.59 (D.C. Cir. 1978).

[7] *Energy Impacts of the Coal Strike: Hearing before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 2d Sess., ser. 95-132, at 5 (1978) (testimony of John F. O'Leary, Dep. Sec'y of Energy).

and elsewhere by state officials.[8] On February 11, 1978, in response to a petition by the Governor of Ohio, President Carter declared an energy emergency under section 110(f) of the Clean Air Act.[9] Similar determinations were issued regarding Indiana, Kentucky, Pennsylvania, Maryland and Alabama.[10] Ohio chose to require each utility to file its own separate plan for dealing with the emergency, while Indiana, West Virginia, Virginia and Kentucky adopted statewide plans. The Tennessee Valley Authority had its own plan. Nat'l Elec. Reliability Council, The Coal Strike of 1977-78: Its Impact on the Electric Bulk Power Supply in North America 4 (May 30, 1978). Like Columbus and Southern and the other Ohio utilities, utilities in other states incurred extraordinary purchased power expenses. Unlike Columbus and Southern, however, at least some utilities in other jurisdictions were allowed to recover all of those expenses. *See City of Pittsburgh v. Pennsylvania Public Utility Comm'n,* 42 Pa. Commw. Ct. 242, 400 A.2d 672, 674 (1979); *In re Potomac Edison Co.,* No. 9208 (W.Va. Pub. Serv. Comm'n Dec. 28, 1978).

The provision of utility service during times of scarcity advances a public policy of the highest order. In the 1977-78 coal strike, the strong public interest in avoiding blackouts, voltage reductions and other measures that impinge directly on users of electricity—both commercial and residential—was vindicated to a remarkable extent, thanks in large part to utility advance planning, customer cooperation, and the existence of interconnections which facilitate the wheeling of power from areas of plenty to areas of scarcity.

This happy result had the side effect of increasing costs. "The power purchases and exchanges generally insured the reliability of the electrical system, but did work to increase the cost of electricity generated and exchanged during the emergency".[11] That such increases in the cost of service would occur

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[8] *Id. See generally* GAO Report, *supra* note 2, at 26-29.

[9] *House Hearing, supra* note 7, at 30; 43 Fed. Reg. 12273, 12283 (Mar. 24, 1978).

[10] 43 Fed. Reg. 12275-89, 13365 (1978).

[11] GAO Report, *supra* note 2, at 30.

was clearly known to the Ohio Commission. In the course of the strike, the Commission entered the following findings, among others:

> (3) In order to preserve remaining coal stock piles the utilities have purchased power in excess of normal requirements and have dispatched power among their own facilities in deviation from economic dispatch.
>
> (4) These actions result in increased costs of power supply.
>
> (5) The customers of each utility should be advised of those increased costs and receive an indication of the effect of such increases to [sic] their bills for electric consumption.[12]

The clear implication of this action was that consumer bills would reflect the costs of the power purchased by the utilities in meeting the declared emergency conditions. Neither the Commission's decision in this case nor the Ohio Court's *per curiam* here on review makes any reference to these findings. For reasons that are not apparent, once the strike was over and the danger averted, the Commission chose to disregard the view it had previously expressed concerning who was to pay for the benefit of uninterrupted service.

In the aftermath of the 1977-78 coal strike, the Department of Energy issued regulations implementing the standby Federal energy conservation plan provisions of the Emergency Energy Conservation Act of 1979.[13] The preamble to those regulations recognizes that wheeling "and modified system dispatch may result in higher electricity costs for utilities and customers," and goes on to observe that "power-wheeling may result in increased (and possibly non-recoverable) costs to

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[12] *In re Emergency of the Electrical Energy Supply within the State of Ohio*, No. 78-106-EL-UNC (Ohio Pub. Utils. Comm'n Mar. 7, 1978).

[13] 42 U.S.C. §8513(b) (Supp. III 1979); 45 Fed. Reg. 8462 (Feb. 7, 1980).

importing utilities and may require a temporary adjustment in rate structures to make it feasible."[14] "Without the strong support of State regulatory officials, utility managers may be reluctant to institute these measures and to incur the higher than normal operating costs associated with them".[15]

EEI certainly agrees that energy emergency management requires strong support from state regulatory officials for utility actions that mitigate otherwise critical conditions, but the matter is not merely one of administrative preference. As indicated in the Jurisdictional Statement and in the succeeding portion of this Brief, if a state requires that continued service be furnished in an emergency, the regulatory agency must in some manner make provision for the recognition of emergency-related non-fuel costs of purchased power. Otherwise, confiscation has occurred.

Here, Columbus and Southern exhausted every route conceivably available to it to recover expenses the Ohio Commission recognized would be inevitable and properly chargeable to customers. Far from questioning the prudence of these expenses, the Ohio Court has held, as a matter of state law, that the utility was only doing what it was required to do to meet the emergency. To deny it recovery in these circumstances violates the constitutional prohibition against confiscation.

THE QUESTION PRESENTED IS SUBSTANTIAL

OHIO'S ACTION UNCONSTITUTIONALLY DEPRIVES THE UTILITY OF JUST COMPENSATION FOR COSTS OF SERVICE FURNISHED IN AN EMERGENCY, FOR WHICH NO OTHER RECOVERY IS AVAILABLE.

This case presents a question of constitutional dimension with unusual clarity: may a state deny compensation to a utility that furnishes electric service in an energy emergency, as required by state law? Ohio required Columbus and Southern to purchase more costly power as an emergency measure for the

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[14] 45 Fed. Reg. at 8489; 5 Energy Mgt. (CCH) §32,501, at 32,699.

[15] *Id.*; 5 Energy Mgt. (CCH) ¶32,501, at 32,700.

purpose of conserving coal supplies, and thereafter denied recovery from the customers of that portion of the resulting extra expense not recovered through operation of a fuel adjustment clause.[16]

Several critical facts govern this case: (1) an energy emergency existed, (2) the utility was held to have an obligation to furnish service, (3) the utility was not itself to blame for the emergency, (4) the duration of the strike could not reasonably have been predicted or taken into account in the development of rates, (5) the utility furnished service without interruption during the emergency, and in the process (6) incurred extraordinary but proper expenses of more than $6,000,000 which (7) it has been barred from recovering from the customers who received that service. The result is a clear taking without just compensation in violation of the Constitution.

Decisions of this Court establish that a public utility is entitled to be compensated for the costs incurred in providing service to its customers. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). "The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges". *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 291 (1923) (Brandeis, J., concurring); *Hope Natural Gas, supra*, at 603. This Court has repeatedly held that a public utility is entitled to recover all reasonable costs of providing service to its

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[16] This case does not present the question whether every unpredictable utility cost must be reimbursed in full. Rather, the narrow issue is whether, in an unquestionable emergency, the costs of furnishing the uninterrupted service here found to be required by state law must be borne by those who receive it. Resolution of this issue is proper on the facts of this case, since there is no doubt that an emergency existed as a result of the 1977-78 coal strike. Federal and state declarations to that effect make it unnecessary for the Court to fashion a test for determining whether a particular situation constitutes an emergency.

customers.[17] In short, it is an "obvious basic premise" that "[a] rate order which does not provide for proper allowable expenses, taxes, depreciation and return, is unfair, unreasonable and confiscatory." *Mississippi River Fuel Corp. v. FPC,* 163 F.2d 433, 451 (D.C. Cir. 1947). "If properly incurred, [expenses] must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce". *Id.* at 437.

The decision below directly contravenes these teachings in a divided *per curiam* opinion that is as ill-conceived and devoid of authority as it is brief. None of the majority's four reasons for rejecting Columbus and Southern's request has the slightest merit.

1. First, the majority observed that the Ohio Commission "has consistently disallowed utility companies, including appellant, from recovering the non-fuel costs associated with the emergency period" of the 1977-78 strike. The only authority cited for this proposition was a pair of unreported Commission decisions dealing with the same coal strike and dating from November 1978. Neither was the subject of judicial review, and neither is entitled to deference as binding constitutional precedent from the standpoint of source or age. All they show is that the Ohio Commission made the same error in other recent cases. Whatever the case might be if the doctrine relied on were longstanding and widespread, *Payton v. New York,* 445 U.S. 573, 600 (1980), or "fortified by acquiescence continued through the years," *Life & Casualty Ins. Co. of Tennessee v. McCray,* 291 U.S. 566, 572 (1934)(citations omitted), none of these considerations lend any support to the result below.

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[17] *Driscoll v. Edison Light & Power Co.,* 307 U.S. 104, 121 (1939); *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 1),* 294 U.S. 63, 68 (1935); *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 2),* 294 U.S. 79 (1935); *Ohio Utils. Co. v. Pub. Utils. Comm'n of Ohio,* 267 U.S. 359, 363 (1925); *Georgia Ry. & Power Co. v. Railroad Comm'n,* 262 U.S. 625, 633 (1923); *Galveston Elec. Co. v. City of Galveston,* 258 U.S. 388, 399 (1922). *See generally* 1 A. Priest, *Principles of Public Utility Regulation* 49-51 (1969). Given the Commission's directives during the crisis, *see* Jurisdictional Statement at A92, there is no question as to the reasonableness of the purchases.

2. Second, the majority suggested that no taking occurred because the Commission "simply ordered appellant to do only that which appellant had a statutory obligation to provide for the public." This argument, for which no case authority was cited, is irrelevant. Regardless of when and from where the obligation arose,[18] with the obligation came a constitutional right to be justly compensated for costs that could not be brought within the ratemaking process.

3. The majority's third claim was that the Ohio Commission's response to the coal strike conferred an "unquantified benefit" on Columbus and Southern "by assuring that no other utility's failure to provide energy would adversely reflect upon the appellant's ability to provide future services."[19] This "benefit" is a transparent *post hoc* rationalization which, as this Court has held, "must be viewed critically." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971). A moment's reflection shows it to be "convenient, but false." *Craig v. Boren,* 429 U.S. 190, 199 n.7 (1976).

The effect on Columbus and Southern was neither beneficial nor unquantified. What was conferred was a loss of more than $6,000,000 spent as the non-fuel costs of providing

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[18] The Ohio Court took the position that Columbus and Southern's duty to furnish uninterrupted emergency service arose from §4905.22 of the Ohio Code—a general service provision—rather than §4909.16, which is specifically addressed to energy emergencies, and which was relied on by the Ohio Commission in its February 14, 1978 order. Jurisdictional Statement at A92. While it is immaterial which statute is relied on for constitutional purposes, the notion that the utility's duties were the same regardless of the energy emergency legislation and Commission action thereunder does seem improbable in the extreme, since it requires one to assume that the Ohio Legislature acted unnecessarily in passing the emergency measure. *E.g., Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977); *Uptagrafft v. United States,* 315 F.2d 200, 204 (4th Cir.) (per curiam), *cert. denied,* 375 U.S. 818 (1963); *cf. United States v. Menasche,* 348 U.S. 528, 538-39 (1955).

[19] The notion that Columbus and Southern benefited from the Commission's action in dealing with the emergency appears nowhere in the Commission's decision. Rather, the point emerged, without any basis in the record, in the main brief filed by the appellee in the Supreme Court of Ohio. *Cf. West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 2), supra* note 17, at 82-83 (*semble*).

purchased power to the customers. The only "benefit" was that conferred upon Columbus and Southern's customers, who received service without paying for it. To describe this as a "benefit" to Columbus and Southern is Kafkaesque.

The Ohio Court's characterization of this topsy-turvy "benefit" shows it to be a figment. The ability or inability of Utility A to provide energy could never "adversely reflect upon" Utility B's "ability to provide future services." Though interconnected, utilities are distinct and it demeans the intelligence of the public to assume that it treats them all as a single entity to which some form of collective responsibility applies. If the Ohio Commission and Court, on the other hand, were assuming they were doing Columbus and Southern a favor by protecting it from harm to its reputation for reliability, one would think that this is a matter classically left to business management, not forced on unwilling shareholders as a lame excuse for disallowing a valid claim for unquestionably proper costs of service. "Benefits" as illusory as these can be foregone.

Alternatively, if the Ohio Court was intimating that the utility here had received the "benefit" of being able to continue its operations (and therefore continue its cash flow from the sale of energy, albeit without full recovery) as a consequence of the purchases, the point still would have no merit. This Court in an opinion by Justice Cardozo unanimously rejected a similar argument by the same Commission nearly 50 years ago in *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 2), supra* note 17, at 82-83. To adopt such an argument is to approve a "free ride" on the theory that the company had to operate its plants anyway. Electric customers, however, are no more entitled to a "free ride" as far as the extra cost of purchased power is concerned, than were the industrial gas customers in *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 615 (1945) (Jackson, J., concurring). As Justice Jackson pointed out, the notion of a "free ride" is not acceptable "as a principle of public regulation." To accept it in this case is to tolerate confiscation.

4. Finally, the Ohio majority argued, on the basis of this Court's decision in *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679 (1923), that

"a public utility has no constitutional right to recover past and unrecovered costs through present and future rates." This application of *Bluefield* is made possible only by a partial quotation which stands that case on its head.

In *Bluefield,* this Court held that a public utility was being deprived of just compensation because it was compelled to serve the public at confiscatory rates. *Id.* at 695. In reaching this conclusion, this Court stated:

> The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, *and the fact that the utility is protected against being compelled to serve for confiscatory rates* tends to support it. *Id.* at 694 (emphasis added).

Thus, *Bluefield* teaches that a utility cannot be forced to serve the public at a loss. Only by ignoring the second half of the sentence quoted can *Bluefield* be said to support the proposition that the Ohio Commission may deny just compensation for a legitimate cost of providing service.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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